NOV 14 1977

IN THE

# Supreme Court of the United Statemak, JR., CLERK

October Term, 1977

No77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner.

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
TOWN OF AVILLA, INDIANA,
municipal corporations,

Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WHITNEY NORTH SEYMOUR

Counsel for Petitioner

One Battery Park Plaza

New York, New York 10004

(212) 483-9000

Of Counsel:

RICHARD M. DICKE
PETER J. SCHLESINGER
DENNIS G. JACOBS
SIMPSON THACHER & BARTLETT

THOMAS W. YODER
LAWRENCE A. LEVY
LIVINGSTON, DILDINE, HAYNIE & YODER

November 14, 1977

# TABLE OF CONTENTS

	PAGE
Opinions and Orders Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
A. The Complaint	4
B. I&M's Motion to Dismiss	5
C. FPC v. Conway Corp.	6
D. Court of Appeals Decision	8
Reasons for Granting the Writ	10
Point I—The decision below disregards the natural implications of <i>Conway</i> and will encourage the growing practice of filing dual claims of price squeeze with both FPC and the district court	10
Point II—The decision below conflicts with the principles of implied repeal of the antitrust laws set forth in Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Gordon v. New York Stock Exchange, 422 U.S. 659 (1975); and United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975)	16
Point III—The decision below relies on an over-expansive reading of Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), as this Court's opinion in Bates v. State Bar of Arizona, — U.S. —, 97 S.Ct. 2691 (1977) demonstrates	20

	PAGE
Point IV—Judicial economy requires that FPC exercise primary jurisdiction over price squeeze allegations	24
Conclusion	28
Appendix	1a
Text of Statutes Relied On	1a
Federal Power Act §205, 16 U.S.C. §824d	1a
Federal Power Act §206(a), 16 U.S.C. §824e(a)	3a
Sherman Act §2, 15 U.S.C. §2	4a
Clayton Act §4, 15 U.S.C. §15	4a
Clayton Act §16, 15 U.S.C. §26	5a
Order and Judgment of the Court of Appeals	6a
Opinion of the Court of Appeals	7a
Order and Memorandum of the District Court, May 1, 1975	31a
Order of the District Court, October 22, 1976	54a
Complaint	55a
Amendment to the Complaint	63a

# TABLE OF AUTHORITIES

PAGE
Cases:
Bates v. State Bar of Arizona, — U.S. —, 97 S.Ct. 2691 (1977)
Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U.S. 679 (1923)
Borough of Elwood v. Pennsylvania Power & Light
Co., Civil No. 77-1145 (W.D. Pa.)
7738 and E-7784, 12 F.P.S. 5-577 (July 6, 1977) 10
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)8, 9, 10, 20, 22
Carolina Power & Light Co., FPC Docket No. ER76-
495 (Phase II), Initial Decision of the Adminis-
trative Law Judge (Sept. 7, 1977)
Central Power & Light Co., FPC Order, Docket No.
ER77-514 (October 14, 1977)
Cities of Batavia v. FPC, 548 F.2d 1056 (D.C. Cir.
1977)
Cities of Batavia v. Commonwealth Edison Co., Civil
No. 76 C 4388 (N.D. Ill.)
Cities and Villages of Plymouth v. Wisconsin Power
& Light Co., Civil No. 77C223 (W.D. Wis.) 11
City of Groton v. Connecticut Light & Power Co., Civil
No. 15609 (D. Conn.) 11
City of Kirkwood v. Union Electric Co., Civil No. 77-
0947-C(2) (E.D. Mo.) 11
City of Newark v. DelMarVa Power & Light Co., Civil
No. 77-234 (D. Del.)
City of Shakopee v. Northern States Power Co., Civil
No. 4-75-591 (D. Minn.)
Columbus & Southern Ohio Electric Co., FPC Order,
Aug. 26, 1977, Docket No. ER77-529, 42 Fed. Reg.
44026-027 (Sept. 1, 1977)

PAGE	PAGE
Commonwealth of Pennsylvania v. State of West Virginia, 262 U.S. 553 (1923)	Richmond Power & Light v. Indiana & Michigan Elec-
ginia, 262 U.S. 553 (1923)	trie Co., Civil No. S 77-173 (N.D. Ind.) 11
Docket No. E-7743, 12 F.P.S. 5-746 (July 20, 1977) 11	Silver v. New York Stock Exchange, 373 U.S. 341
Docket No. E-1143, 12 F.1. S. 5-140 (5 dry 20, 1311)	(1963)
Dayton Power & Light Co., FPC Order, Docket No.	(1505)
ER76-887 (October 13, 1977)	Town of Norwood v. Boston Edison Co., Civil No. 74-
	4104T (D. Mass.)
Federal Power Commission v. Conway Corp., 510 F.2d	Towns of Concord v. Boston Edison Co., Civil No. 76-
1264 (D.C. Cir. 1975), aff'd 426 U.S. 271 (1976) 7	4556 (D. Mass.)
Federal Power Commission v. Conway Corp., 426 U.S.	
271 (1976)	Union Electric Co., FPC Order, October 25, 1977,
Federal Power Commission v. Natural Gas Pipeline	Docket No. ER77-614, 42 Fed. Reg. 57515-516
Co., 315 U.S. 575 (1942)	(Nov. 3, 1977)
Federal Power Commission v. United Gas Pipe Line	United States v. National Association of Securities
Co., 393 U.S. 71 (1968)	Dealers, Inc., 422 U.S. 694 (1975)
	United States v. Philadelphia National Bank, 374 U.S.
Fordon v. New York Stock Exchange, 422 U.S. 659	321 (1963)
(1975)	
Gulf Power Co., FPC Docket No. ER77-532 11	Statutes and Regulations:
Louisiana Power & Light Co., FPC Order, Aug. 26,	Sherman Act §2, 15 U.S.C. §2
1977, Docket No. ER77-533, 42 Fed. Reg. 44583-	Clayton Act §4, 15 U.S.C. §15
585 (Sept. 6, 1977)	Clayton Act §16, 15 U.S.C. §26
	Federal Power Act §205, 16 U.S.C. §824d
Minnesota Power & Light Co., FPC Ruling, Docket	Federal Power Act §206, 16 U.S.C. §824e
No. ER77-427 (Sept. 26, 1977)	Federal Power Act §313, 16 U.S.C. §8251
	28 U.S.C. §1254(1)2
Parker v. Brown, 317 U.S. 341 (1943)	28 U.S.C. §1292(b)
Pennsylvania Power & Light Co., FPC Docket No. E-	18 C.F.R. §35.13(b)(1) (1977)
8927, Order Affirming Initial Decision (March 24,	Burns Ind. Stat. Ann., Title 8, §8-1-1-5
1977) 27	Mich. Stat. Ann., Title 22, §22.13(6)
Philadelphia Electric Co., FPC Order No. 791, Docket	
Nos. E-7795 and E-7989, 11 F.P.S. 5-906 (April 6,	Miscellaneous Material:
1977) 11	
Public Service Commission v. F.P.C., 487 F.2d 1043	FPC Order No. 563, issued March 21, 1977, 42 Fed.
(D.C. Cir. 1973)	Reg. 16131 (March 25, 1977), rehearing denied,
	May 20, 1977, 42 Fed. Reg. 27574 (May 31, 1977) 27

-	CONTRACTOR OF THE	
N	THE	

# Supreme Court of the United States

October Term, 1977

No.

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
TOWN OF AVILLA, INDIANA,
municipal corporations,

Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Indiana & Michigan Electric Company, respectfully prays that a writ of certiorari issue to review the order and judgment and the opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on August 16, 1977.

### Opinions and Orders Below

The order and judgment and the opinion of the Court of Appeals, not yet officially reported, are reproduced in the Appendix<sup>1</sup> at 6a and 7a, respectively; its opinion appears at 1977-2 CCH Trade Cas. ¶61,587. The May 1, 1975 order and opinion of the district court, not officially reported, are reproduced at 31a; its opinion appears at 1975-1 CCH Trade Cas. ¶60,318 and at 18 P.U.R. 4th 175. The October 22, 1976 order of the district court, not otherwise reported, is reproduced at 54a.

#### Jurisdiction

The order and judgment and the opinion (6a and 7a, respectively) of the Court of Appeals were entered on August 16, 1977. This petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

#### Questions Presented

Whether the United States Court of Appeals for the Seventh Circuit erred in deciding that this Court's decision in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976), holding as it does:

- 1. that the Federal Power Commission has jurisdiction to consider allegations of an anticompetitive "price squeeze"; and
- that the Federal Power Commission must consider allegations of an anticompetitive "price squeeze" in setting wholesale electric rates;

does not vest in the Federal Power Commission<sup>2</sup> exclusive or, alternatively, primary jurisdiction to hear and rule upon plaintiffs' "price squeeze" allegations.

#### Statutes Involved

This petition involves issues which require an accommodation between Sections 205 and 206(a) of the Federal Power Act, on the one hand, and Section 2 of the Sherman Act and Sections 4 and 16 of the Clayton Act, on the other hand. These statutes are set out in the Appendix hereto at 1a through 5a.

#### Statement of the Case

The jurisdiction of the district court was invoked by a Complaint which purports to raise alleged violations of the Sherman Act, §2, 15 U.S.C. §2, and of the Clayton Act, §\$4 and 16, 15 U.S.C., §\$15 and 26 (1970). At issue on this petition is whether or not there is an implied repeal of antitrust jurisdiction in a district court, such repeal being predicated upon the determination by this Court that a regulatory agency must accept and exercise jurisdiction over the identical allegations of specific antitrust violations

<sup>1.</sup> Citations with the suffix "a" are to the Appendix hereto.

<sup>2.</sup> On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act, Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 13, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission which, as an independent commission within the Department of Energy, was activated on October 1, 1977. We have, for purposes of convenience, used the designation "FPC" herein wherever it is intended to refer to either the Federal Power Commission or the Federal Energy Regulatory Commission.

in a regulated industry which are presented for determination by the Complaint filed in a district court.

Indiana & Michigan Electric Company ("I&M") is an electric utility engaged in the generation, transmission and distribution of electric energy for sale both at retail and at wholesale for resale. This antitrust action was commenced on March 25, 1974 in the United States District Court for the Northern District of Indiana, South Bend Division, against I&M by ten of its municipal wholesale-for-resale customers, which are located in the States of Indiana and Michigan ("Municipalities").3

Municipalities instituted this action during the pendency of lengthy proceedings before FPC, and the Complaint and the Amendment to the Complaint allege matters which were and which, in part, are still the subject of proceedings before FPC. In addition, the Complaint alleges matters which were, and are, subject to the jurisdiction of the Public Service Commissions of Indiana and Michigan ("Indiana Commission" and "Michigan Commission," respectively).

#### A. The Complaint

The Complaint seeks declaratory and injunctive relief and treble damages for alleged violations of Section 2 of the Sherman Act. 61a. The Complaint alleges that I&M monopolized and attempted to monopolize interstate trade and commerce in the retail distribution and sale of electric power. Specifically, it is charged that I&M sought to eliminate Municipalities as competitors in the sale of electric power at retail by creating a difference, i.e., a "price squeeze," between (a) the wholesale price I&M charges Municipalities for the sale of electric power and (b) the retail price I&M charges its direct industrial customers for electric power. 58a-60a.

Municipalities allege that the price squeeze prevents them from competing effectively with I&M for industrial customers. The Complaint charges that the price squeeze is reflected in a rate increase made effective by FPC, subject to refund, on January 13, 1973, which affected the rates charged Municipalities by I&M. 58a-59a. On May 28, 1976, I&M made a further filing with FPC for an increase in its wholesale rates to Municipalities, and an Amendment to the Complaint alleges that a further price squeeze was created when that increase became effective, subject to refund, on July 27, 1976. 63a-64a.<sup>5</sup>

#### B. I&M's Motion to Dismiss

On May 1, 1974, I&M moved the district court to dismiss or, in the alternative, to stay the instant proceedings. On May 1, 1975, the district court, per District Judge Grant, issued an Order and Memorandum denying I&M's motion. 31a.

I&M has other wholesale-for-resale customers—municipalities, rural electric cooperatives and investor-owned utilities—which are not plaintiffs here.

<sup>4.</sup> I&M has approximately 31 retail Tariffs on file with the Indiana Commission, five of which I&M would concede are industrial Tariffs; I&M likewise has approximately 14 retail Tariffs on file with the Michigan Commission, two of which I&M would concede are industrial Tariffs. The complaint does not specify which of I&M's retail Tariffs create the alleged price squeeze.

I&M's answer to the Complaint was served on June 27, 1975 and I&M's answer to the amendment of the Complaint was served on November 5, 1976.

On May 12, 1975, I&M filed a motion to reconsider, vacate, set aside and amend the district court's May 1, 1975 Order, and to certify for appellate review, pursuant to 28 U.S.C. §1292(b), the questions of law which are raised in this Petition. On October 22, 1976, District Judge Sharp adhered to District Judge Grant's May 1, 1975 Order and Memorandum, but certified the issue to the United States Court of Appeals of the Seventh Circuit. 54a. The Court of Appeals thereafter accepted the certification.

#### C. FPC v. Conway Corp.

In the early stages of the proceedings before FPC involving I&M's June 13, 1972 filing for upward revisions in its wholesale rates (FPC Docket No. E-7740), FPC ruled, in an Order issued November 27, 1973 and affirmed on rehearing on January 17, 1974, that the claim of Municipalities, among others, of a wholesale-retail price squeeze would not be considered in the pending proceeding.<sup>6</sup> On March 7, 1974, Municipalities, among others, filed a Petition for Review, pursuant to Section 313 of the Federal Power Act with the United States Court of Appeals for the District of Columbia Circuit to review FPC's Orders of November 27, 1973 and January 17, 1974 and three weeks later, on March 28, 1974 the Complaint herein was filed with the district court.

On June 7, 1976, this Court issued its decision in Federal Power Commission v. Conway Corp., 426 U.S. 271

(1976), holding that FPC has jurisdiction, which it must exercise, to consider allegations of an anticompetitive price squeeze in setting wholesale electric rates. All parties recognize the impact of Conway on the issues in this action. Following this Court's decision in Conway, Municipalities and the other members of the Indiana and Michigan Municipal Distributors Association ("IMMDA")8 requested FPC to "confess error" before the District of Columbia Court of Appeals for FPC's prior refusal to consider IMMDA's price squeeze allegations in connection with IMMDA's challenge to I&M's 1972 rate increase filing. In August, 1976, a successor FPC Presiding Administrative Law Judge ruled on the issues involving I&M's 1972 rate increase filing, and, among other things, he recommended that the price squeeze issues raised by Municipalities through IMMDA be resolved by FPC in further proceedings.9

On January 31, 1974, the Presiding Administrative Law Judge assigned to FPC Docket No. E-7740 granted an FPC Staff Counsel's motion to eliminate all price squeeze testimony and exhibits from FPC Docket No. E-7740.

<sup>7.</sup> I&M's motion for reconsideration of District Judge Grant's Order and Memorandum of May 1, 1975 was predicated upon the Court of Appeals decision in *Conway*, 510 F.2d 1264 (D.C. Cir. 1975), subsequently affirmed by this Court.

<sup>8.</sup> IMMDA is an *ad hoc* association of twelve of I&M's municipal wholesale-for-resale customers, ten of which are the plaintiffs here.

<sup>9.</sup> Initial Decision, issued August 19, 1976 in FPC Docket No. E-7740. Issues raised in Docket No. E-7740 were the subject of an Agreement of Settlement and Compromise entered into between IMMDA and I&M, and that Agreement was approved by FPC in its Order issued June 1, 1977. Municipalities contended before the Court of Appeals that that Agreement did not bear upon their ability to prosecute antitrust claims arising out of I&M's 1972 rate filing, and the Court of Appeals has directed the district court to determine whether that Agreement has mooted any of the antitrust claims in this case. As the Court of Appeals has noted, however, the claims premised upon I&M's July 27, 1976 wholesale rate filing with the FPC are still "active." 30a.

#### D. Court of Appeals Decision

In its opinion dated August 16, 1977, the Court of Appeals affirmed both the May 1, 1975 and October 22, 1976 orders of the district court and held that FPC's jurisdiction, under *Conway*, to hear and determine price squeeze allegations is neither exclusive nor primary, and that the district court may proceed to determine the antitrust allegations raised in this action.

The Court of Appeals ruled that FPC's price squeeze jurisdiction is not exclusive because its remedial powers are not coextensive with those of the district court. Relying upon this Court's observation in Conway, that FPC's power to remedy an anticompetitive price squeeze is limited to a wholesale rate adjustment "at the very least" to the lower range of the zone of reasonableness for the recovery of fully allocated costs (426 U.S. at 279), the Court of Appeals found that the powers of the district court, including the power to grant treble damages and injunctive relief, are required to supplement those of FPC. 14a-16a, 20a, 26a. Thus, the decision below turned on an erroneous assumption that exclusive jurisdiction in a regulatory agency can only be found when it has remedial powers that are coextensive with the remedial powers of a district court.

Moreover, the Court of Appeals erroneously analyzed this Court's decision in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), which held that that utility's light bulb exchange program was not exempted from the federal antitrust laws by virtue of that program's inclusion in a rate tariff filed with, and approved by, a State public service

commission. Applying the language of Cantor to the instant case, the Court of Appeals ruled that "[t]he state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant" (17a), and that the state action exception to the federal antitrust laws was therefore inapplicable.

The decision below declared that FPC's regulatory process would not be disturbed by an award of damages for past anticompetitive conduct or by a district court injunetion regulating I&M's conduct "in making and promoting its rate applications" prior to their submission to varie regulatory agencies. Any conflict between determination in the district court and FPC would be avoided, the Court of Appeals held, because "the district court would presumably order [I&M] to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendant's industrial customers." 26a. The Court below therefore held that FPC's jurisdiction to hear and determine price squeeze claims is not exclusive and, therefore does not oust the district court of its jurisdiction, under the federal antitrust laws, to determine the same claims.

Further, the Court of Appeals rejected I&M's arguments that FPC's jurisdiction to hear and determine price squeeze claims is at least primary and that the district court proceedings should be stayed pending a determination by FPC.

<sup>10.</sup> Parker v. Brown, 317 U.S. 341 (1943).

# Reasons for Granting the Writ

The argument that follows demonstrates that the Court of Appeals decision has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the district courts, as to call for an exercise of this Court's power of supervision. The decision of the Court of Appeals will disrupt the orderly regulatory process because (1) the decision below will encourage the growing practice of filing dual price squeeze claims with FPC and with the district courts; (2) the ruling of the court below directly conflicts with the principles of antitrust repealer set forth in decisions of this Court; (3) the decision below relies upon an over-expansive reading of this Court's ruling in Cantor; and (4) judicial economy requires that FPC exercise primary jurisdiction, at least, over price squeeze claims.

#### POINT I

The decision below disregards the natural implications of *Conway* and will encourage the growing practice of filing dual claims of price squeeze with both FPC and the district court.

This Court's decision in Conway directs FPC to resolve claims of an anticompetitive price squeeze arising from differing wholesale and retail rates, and to alleviate any anticompetitive price squeeze found to exist to the extent of its jurisdiction. Numerous price squeeze claims of the kind at issue herein have been filed with FPC. E.g., Boston Edison Co., FPC Op. No. 809, Docket Nos. E-7738 and

E-7784, 12 F.P.S. 5-577 (July 6, 1977); Connecticut Power & Light Co., FPC Op. No. 761-A, Docket No. E-7743, 12 F.P.S. 5-746 (July 20, 1977); Dayton Power & Light Co., FPC Order, Docket No. ER76-887 (October 13, 1977); Minnesota Power & Light Co., FPC Ruling, Docket No. ER77-427 (Sept. 26, 1977); Central Power & Light Co., FPC Order, Docket No. ER77-514 (October 14, 1977); Gulf Power Co., FPC Docket No. ER77-532; Louisiana Power & Light Co., FPC Order, Aug. 26, 1977, Docket No. ER77-533, 42 Fed. Reg. 44583-585 (Sept. 6, 1977); Columbus & Southern Ohio Electric Co., FPC Order, Aug. 26, 1977, Docket No. ER77-529, 42 Fed. Reg. 44026-027 (Sept. 1, 1977); Union Electric Co., FPC Order, October 25, 1977, Docket No. ER77-614, 42 Fed. Reg. 57515-516 (Nov. 3, 1977). See also Philadelphia Electric Co., FPC Order No. 791, Docket Nos. E-7795 and E-7989, 11 F.P.S. 5-906 (April 6, 1977) (reverse price squeeze asserted by utility). Similarly, numerous price squeeze claims of the kind at issue herein have been filed in the district courts across the country. E.g., Cities of Batavia v. Commonwealth Edison Co., Civil No. 76 C 4388 (N.D. Ill.); City of Newark v. DelMar-Va Power & Light Co., Civil No. 77-234 (D. Del.); City of Shakopee v. Northern States Power Co., Civil No. 4-75-591 (D. Minn.); City of Kirkwood v. Union Electric Co., Civil No. 77-0947-C(2) (E.D. Mo.); Town of Norwood v. Boston Edison Co., Civil No. 74-4104T (D. Mass.); City of Groton v. Connecticut Light & Power Co., Civil No. 15609 (D. Conn.); Towns of Concord v. Boston Edison Co., Civil No. 76-4556 (D. Mass.); Richmond Power & Light v. Indiana & Michigan Electric Co., Civil No. S 77-173 (N.D. Ind.); Cities and Villages of Plymouth v. Wisconsin Power & Light Co., Civil No. 77C223 (W.D. Wis.); Borough of Elwood v. Pennsylvania Power & Light Co., Civil No. 77-1145 (W.D. Pa.).<sup>11</sup>

The Court of Appeals' decision encourages the practice of dual proceedings, administrative and judicial, and requires the federal courts to hear and determine the same issues that are being heard and determined by FPC. While a district court's determination in a price squeeze case might appear to have the virtue of operating upon whole-sale and retail rates, it has the concomitant and fatal disadvantage of interfering with all levels of the rate-making process previously entrusted to FPC and to the State commissions. A second regulatory system for wholesale and retail rate-making is thus being created in the federal courts, whose background in the field does not commend them to be preferred over the natural and specially chosen regulatory agencies, federal and State.

I&M does not believe that this Court entertained and decided the Conway case, mandating FPC to exercise its jurisdiction to resolve antitrust price squeeze allegations in the electric utility industry, in the expectation that the district courts would conduct parallel proceedings on precisely the same issue. The orderly distribution of jurisdiction, related both to convenience and natural competency, contemplated by Conway, is disrupted by the invitation to multiple proceedings which is inherent in the decision below. The logical corollary to this Court's holding in Conway is that the district court is not expected to exercise jurisdiction over the identical subject matter, since existence of district court jurisdiction over these issues would have obviated any necessity for this Court to re-

quire FPC, with its jurisdictionally limited ability to provide a remedy, to hear them as well.

The Court of Appeals indicates that the district court is a necessary forum for allegations of anticompetitive price squeezes because, under Conway, FPC's ability to remedy the squeeze is limited, "at the very least," to the setting of the wholesale rate in the lower range of the zone of reasonableness. 14a-16a. That power may indeed be quite sufficient. See Carolina Power & Light Co., FPC Docket No. ER76-495 (Phase II), Initial Decision of the Administrative Law Judge at 82 (Sept. 7, 1977). The right course would seem to be to allow FPC to exercise its jurisdiction as this Court has required, without proceeding on the assumption that it will administer relief improperly and require a district court to be constantly looking over its shoulder. Should FPC fail in its duty, there is an obvious remedy without need for a perennial monitor, for a rate set below the zone of reasonableness would be confiscatory and therefore unconstitutional. Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942); Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U.S. 679 (1923); Public Service Commission v. F.P.C., 487 F.2d 1043, 1092 (D.C. Cir. 1973).

The Court of Appeals' rationale for rejecting the principle of exclusive jurisdiction in FPC is that its remedial power is limited by *Conway* to its jurisdictional power to set rates within the zone of reasonableness. However, a wholesale rate level set below the zone of reasonableness would be confiscatory and therefore unconstitutional

<sup>11.</sup> Clearly, the liminal jurisdiction issues raised by this petition, and directly involved in each of the cited cases, can and should be resolved at the outset of the litigation. Gordon v. New York Stock Exchange, 422 U.S. 659, 686 (1975).

whether imposed by FPC or by the district court. Thus any district court injunction affecting I&M's rate submissions to FPC and to the State Commissions would have to consider the justness and reasonableness of the rate, including the rate of return, a concept reflecting the public interest in the financial soundness of essential private utilities, as well as all of the other public interest considerations that animate the administration of the Federal Power Act and the several State public utility regulatory statutes. Under the procedure envisioned by the Court of Appeals below, the district courts would be conducting parallel and duplicative reviews of I&M's submissions to FPC and to the Indiana and Michigan Commissions, and the district courts would have the power and obligation to make parallel determinations in matters of regulatory mechanics that have been delegated to administrative agencies.

In Commonwealth of Pennsylvania v. State of West Virginia, 262 U.S. 553 (1923), Justice Brandeis, in dissent, viewed as unacceptable the assumption by this Court, and impliedly by the federal court system, of suits requiring the exercise of regulatory judgments in an area of commerce over which the Commission would later exercise jurisdiction:

"Clearly, this Court could not undertake such determinations. To make equitable distribution [of gas] would be a task of such complexity and difficulty that even an interstate public service commission with broad powers, perfected administrative machinery, ample resources, practical experience and no other duties, might fail to perform it satisfactorily. As this Court would be powerless to frame a decree and provide machinery by means of which such equitable distribution of the available supply could be effected, it should, according to settled practice, refuse to entertain the suits. Compare Marble Co. v. Ripley, 10 Wall. 339, 358; Texas & Pacific Ry. Co. v. Marshall, 136 U.S. 393, 406; Giles v. Harris, 189 U.S. 475, 487, 488." 262 U.S. at 623.

The duplication of judicial administrative effort would, of course, have its counterpart in parallel and duplicative review mechanisms. If FPC concludes that I&M's wholesale rate is "just and reasonable" and that it does not create an anticompetitive price squeeze, the appropriate judicial forum for reconsideration of FPC's determination, as provided by statute, would be the court of appeals empowered to review FPC's decisions under Section 313 of the Federal Power Act, 16 U.S.C. §825l (1971). If the district court is not required to dismiss this action, as I&M contends it is, or does not choose to stay this action for any reason, the appellate procedure available in antitrust cases would result in the delivery of a second complete record, incorporating perhaps inconsistent findings of fact, to a second court of appeals. One court of appeals might sit in review of the district court's action while another sits in review of FPC proceedings; alternatively, a single court of appeals might sit in review of two determinations on the same issue, based upon two separate records, and would be governed by disparate standards of review. In neither event would judicial economy be served; inevitably there would be duplication of effort on the part of courts, litigants and witnesses. The danger of conflicting results is patent.

#### POINT II

The decision below conflicts with the principles of implied repeal of the antitrust laws set forth in Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Gordon v. New York Stock Exchange, 422 U.S. 659 (1975), and United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975).

The Court of Appeals' decision virtually assures that complex issues of ratemaking will be made subject to conflicting and duplicative fact-finding and review and creates a grave potential for irreconcilable collision between regulatory and judicial resolutions of price squeeze allegations involving the electric utility industry. A line of decisions issued by this Court, and not followed by the Court of Appeals, avoids just such conflict and duplication. This Court should grant review to consider that, if as we believe, this line of decisions is clearly applicable, the Court of Appeals erred in not applying it.

In Silver v. New York Stock Exchange, 373 U.S. 341 (1963), this Court upheld application of the antitrust laws to the Exchange's act of severing plaintiff's private telephone wire connections with the Exchange's member firms, on the ground that the Exchange's rule authorizing such an act, while sanctioned by the Securities and Exchange Commission ("SEC"), was nevertheless not subject to SEC jurisdiction with respect to the particular applications of the Exchange's rule. 373 U.S. at 357. The Court found no implied repeal of the federal antitrust laws in Silver because the facts presented and the claims asserted did not

involve "any problem of conflict or coextensiveness of coverage with the agency's regulatory power." 373 U.S. at 358. The Court noted, however, that a "different case" would have arisen if there had been SEC "jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling." 373 U.S. at 358 n.12.

The instant action presents such a "different case" because I&M's rates are subject to searching review before FPC and the State regulatory agencies. In that sense, it presents the identical legal issue decided by this Court in Gordon v. New York Stock Exchange, 422 U.S. 659 (1975). There, the very conflict held absent in Silver was found to exist, because of the SEC's power over fixed rates on brokerage commissions and the district court's jurisdiction over the antitrust implications of those rates. In Gordon, this Court found it critical that the SEC's power was not limited to approval or disapproval of the Exchange's commission rates and that the SEC "was permitted to require alteration or supplementation of the rules and practices" where necessary. 422 U.S. at 685. Distinguishing Silver, this Court noted that "there was no governmental oversight of the exchange's self-regulatory action" in that case, "and no method of insuring that some attention at least was given to the public interest in competition." 422 U.S. at 684. The principles enunciated in Gordon, where the antitrust laws were held inapplicable to the rate because it was subject to change by the regulatory authority (that is, because the SEC had a species of rate-making authority), are applicable to the instant case. Here, pervasive rate-making authority is vested in FPC and in the State regulatory agencies, and FPC is mandated, under Conway, to consider the public interest in competition in setting the wholesale rates paid by the Municipalities.

<sup>12.</sup> A Petition for a Writ of Certiorari was filed on September 8, 1977, in American Telephone & Telegraph Co. v. United States, Docket No. 77-372, which raises similar issues arising under different procedural circumstances.

On the same day this Court decided Gordon, it also ruled, in United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975), that the SEC's regulatory authority "displaces" the federal antitrust laws with respect to fixed resale prices of mutual fund shares in secondary market transactions. Even though the SEC had never formulated any rule or regulation governing such transactions, an implied repeal of the antitrust laws was nevertheless held to exist by reason of the statutory authority for mutual funds to impose the challenged restrictions, provided, inter alia, that they did not conflict with any SEC rule or regulation. This Court deduced the intention of Congress to effect an implied repeal of the antitrust laws from the "substantial danger that appellees would [otherwise] be subjected to duplicative and inconsistent standards." 426 U.S. at 735. Thus the power of the regulatory body to make rules and regulations, even where that power had not been exercised, was sufficient to create that "plain repugnancy" between the regulatory scheme and the application of the antitrust laws required to effect an implied antitrust immunity, as earlier held in United States v. Philadelphia National Bank, 374 U.S. 321, 351 (1963).

The Court of Appeals decision herein purports to avoid the problem of conflict between regulatory and judicial powers by noting that the district court could remedy an alleged price squeeze by an injunction bearing upon the formulation by I&M of its rate filings *prior* to their submission to FPC and to the State commissions. The district court thus is encouraged to influence the outcome of the various rate-making procedures by bringing its power to bear upon the filings themselves prior to any regulatory consideration of them. This formulation effectively stands orderly administrative procedure for rate-making on its head.

This Court stated in Conway that FPC has remedial power "at the very least" to reduce I&M's wholesale rates to the lower reaches of the "zone of reasonableness." 426 U.S. at 279. The Court of Appeals decision below rests heavily upon FPC's inability fully to alleviate a price squeeze between the wholesale and retail price structures, irrespective of the zone of reasonableness for wholesale rates. I&M submits that the limitation on FPC's remedial power embodied in Conway springs from the lively awareness that an anticompetitive price squeeze is only one of the myriad considerations to be taken into account by FPC in a wholesale rate case and that its determination must serve a complex set of competing public interests. These competing interests cannot be sidestepped or ignored by the Court of Appeals' expedient of endowing the district court with its own supervisory powers over rate-making.

In Conway, this Court refrained from directing FPC to sacrifice any and all other considerations to the alleviation of an anticompetitive price squeeze. However, if electric utilities are to be made subject to district court mandates with respect to the formulation of their rate filings, the federal courts will have rendered antitrust considerations paramount to all other public interests served by rate-making procedures. The Court of Appeals' decision below effectively restricts FPC's necessary flexibility in rate-making by asserting district court jurisdiction over rate filings prior to their submission to the appropriate regulatory agency.

The Court of Appeals recognized that any clear repugnancy between the regulatory and judicial powers would effect a repealer of the antitrust laws. Its decision therefore emphasized its view that there would be no conflict between a district court injunction affecting the formulation of I&M's submissions, prior to filing, and whatever rate order ultimately issued from FPC. The danger inherent in and created by that analysis, however, is that the district court would render FPC helpless to set a higher rate than the rate required to be submitted to FPC under the district court mandate, even where a higher rate would be necessary not only to provide a rate of return sufficient to ensure the financial soundness and integrity of the public utility, but also to assure that the rates themselves are not confiscatory. Thus, although conflict in terms between the regulatory and judicial determinations might appear to be avoided, a clear repugnancy remains. This certainly exalts form over substance.

# POINT III

The decision below relies on an over-expansive reading of Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), as this Court's opinion in Bates v. State Bar of Arizona, —— U.S. ——, 97 S.Ct. 2691 (1977) demonstrates.

Orderly rate making procedures for the electric utility industry have been imperiled by the Court of Appeals' over-expansive reading of Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). In Cantor, this Court declined to apply the Parker v. Brown<sup>13</sup> exception to the antitrust laws with respect to Detroit Edison's policy of distributing free light

bulbs. Despite the approval by the State utility commission of a tariff including such a program, this Court noted that the "option to have . . . such a program" belonged primarily to the utility. 428 U.S. at 594. The Court of Appeals in its decision below has imperiled the rate-making machinery by applying that rationale to I&M's rate applications in their totality; i.e., the Court of Appeals ruled that a utility has the "option" of creating or not creating a price squeeze at the time it formulates its rate filings, and that no State has an "interest" in maintaining a price squeeze.

Cantor held, as this Court has said in Bates v. State Bar of Arizona, — U.S. —, 97 S.Ct. 2691 (1977), that the Parker v. Brown exception is inapplicable to particular programs or activities in which the "market" affected is one in which the state has no "independent regulatory interest." The Parker v. Brown exception was thus unavailable in Cantor because the "State had no independent regulatory interest in the market for light bulbs." Bates at 2697. However, the market affected by the type of order envisioned by the Court of Appeals here is no less than the retail market for the generation and distribution of electric power, in which the states have a powerful regulatory interest and over which they exercise and have legislated pervasive regulation.

The Court of Appeals has misconstrued the Cantor test by looking to the "challenged activity" rather than to the market in which that activity takes place. The opinion below suggests that the States have no interest in perpetuating the challenged activity, i.e., the alleged price squeeze (17a), and has thus opened the entire field of rate-

<sup>13. 317</sup> U.S. 341 (1943).

making to district court supervision. The Court of Appeals' analysis improperly sidesteps any evaluation of the States' interests in the market affected, *i.e.*, the sale of electric power, even though that inquiry is critical to any application of the *Cantor* principle.

The indiscriminate breadth of the Court of Appeals' reading of Cantor is demonstrated by a comparison of the relative impact of the rulings in Cantor and in the instant case upon rate-making regulatory procedure. Under Cantor, the district court may direct the utility to remove from its retail electric rate tariff a single discrete item whose market is not subject to any pervasive regulatory scheme and in the market for which the state has no "independent regulatory interest"; in the instant case, the district court is given supervision over wholesale and retail tariffs for electric power, a supervision which embraces the mechanics of formulating the tariffs, the appropriateness of their individual elements, the fairness of the individual tariffs and the interrelationship of different rates set by different regulatory jurisdictions.

The States of Indiana and Michigan have manifested their interest in electric utility rate-making by implementing pervasive administrative procedures for its regulation. The Court of Appeals declared below that the Indiana and Michigan Commissions "have only put the imprimatur of their sanction on the retail rates charged by the defendant" (17a); however, the Indiana and Michigan Commissions function under broad grants of statutory authority: Burns Ind. Stat. Ann., Title 8, §8-1-1-5 (1973); Mich. Stat. Ann., Title 22, §22.13(6) (1970). Although I&M's retail electric rates originated in the form of requests by I&M for rate

charges, they have emerged from the respective State commissions, after notice and adversary proceedings, as products of those commissions.<sup>14</sup> The Complaint herein does not and could scarcely allege otherwise. It has been settled for over half a century that

"[t]he prescribing of rates is a legislative act. The [Public Service Commission of West Virginia] is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature." Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U.S. 679, 683 (1923).

Similarly, FPC, as an instrumentality of Congress, possesses and exercises vast discretionary power over wholesale tariffs. Federal Power Act, §§205 and 206.

The grant of parallel regulatory power in the district court to govern the relationship between the several retail and wholesale rate structures, to issue findings of fact with respect to each and to regulate by injunction the initial submissions in their totality, raises a likelihood of conflict between regulatory and judicial functions. The unseemliness of a struggle for priority and public acceptance conducted by separate regulatory bodies over the same battle-ground is evident and could be avoided by a proper reading and appreciation of this Court's decisions. The economic and judicial waste inherent in such duplicative procedures is no less disturbing.

<sup>14.</sup> As a matter of public record, I&M's 1976 filing for a retail rate increase of approximately \$75 million from the Indiana Commission resulted in an order from that Commission granting an increase of only about \$41 million. While the factual allegations contained in the Complaint are deemed to be true in the motion which is the subject of this petition, the Complaint nowhere indicates whether the charge of a predatory retail rate is based upon I&M's submissions to the State commissions, or upon the *orders* of the State commissions.

#### POINT IV

Judicial economy requires that FPC exercise primary jurisdiction over price squeeze allegations.

The Court of Appeals also declined to rule that FPC has primary jurisdiction over anticompetitive price squeeze allegations, adding that this antitrust action could be held in abeyance at some later time if deference to FPC would avoid a "significant inconsistency" that would be "certain to arise" between the judicial and regulatory proceedings. 23a. I&M submits that the Court of Appeals' denial to FPC of at least primary jurisdiction was error, particularly since the chief justification offered by the Court of Appeals for the conduct of parallel judicial and regulatory proceedings was the superior remedial power of the district court.

FPC is uniquely qualified by its expertise to render determinations with respect to the threshold question of whether or not an anticompetitive price squeeze exists. As previously noted, that issue raises singularly complex questions involving numerous technical variables. In Cities of Batavia v. FPC, 548 F.2d 1056 (D.C. Cir. 1977), decided after Conway, the court vacated a pre-Conway FPC order declining to exercise jurisdiction over a price squeeze claim virtually identical to that raised in this action. On review, FPC argued that there was a justified differential between the wholesale rate paid by plaintiff municipalities, whose energy demands coincided with the peak load of the system, and the retail rate paid by industrial customers, whose

energy demands generally did not coincide with the peak load of the system. In the exercise of its review powers over FPC orders, the District of Columbia Circuit remanded, enumerating some of the complex issues to be resolved by FPC:

"Under the Conway doctrine the Commission function extends not only to consideration of the existence of a difference between jurisdictional and non-jurisdictional rates, but also to the anticompetitive impact of the particular magnitude of rate differential. The Commission's counsel indicates that the amount of the differential set by the Commission is more than justified by the cost differences of the two services. This contention, however, requires a knowledge of the nature of the system's costs, both fixed and variable, as well as the basis for cost calculations. While it may be that an engineer could make the calculation on the basis of the data in the record, we cannot in a case like this proceed on the basis of calculations by counsel any more than we can accept a rationale by counsel that is not in the Commission's findings. Hence the case must be remanded for consideration in the light of Conway.

"A commission engaged in consideration of rate profiles in the light of Conway at the outset may also discern a question as to the reasonableness of a classification that treats all industrials as a single class, distinct from municipals, on the basis of underlying timing of peak load, when the utility's rate structure does not set the demand and energy charges in terms of the time of peak load of the customer. If a substantial number of industrial consumers have their peak load at a time roughly the same as those of the cities, there is a substantial ousting from the market with no difference in conditions of service. And when

Petitioners in that case appeared before the Seventh Circuit as Amicus Curiae.

there is a competitive advantage to the utility in blanketing such industrials along with other industrials (whose peak characteristics may produce cost savings), there is room for concern on the part of the regulating commission." 584 F.2d at 1057-58.

There is, in short, no way to determine whether the electric utility rate structures are discriminatory without a detailed technical investigation and analysis of the rates and of their components.

The existence of a price squeeze is a question further complicated by the fact that differing ratemaking procedures employed by different regulatory commissions virtually mandate a differential of some magnitude between and among the resulting rates. For example, the Indiana Commission, upon receipt of a petition from I&M that an adjustment in its retail tariffs is required, establishes the test year to be employed; I&M thereupon prepares a cost of service study for the test year so designated, together with its claim of a fair and reasonable return on a fair value rate base. Only then are revenue deficiencies determined and a request for specified rate relief made. To date, the Indiana Commission has required the use of an historic test year. By contrast, FPC regulations now require, for all rate increases in excess of \$1 million, the use of a prospective test year. 18 C.F.R. §35.13(b)(1) (1977). Unless all costs remain static between the historic test year designated by the Indiana Commission and the prospective test year utilized by FPC, some differential between the retail and wholesale rates is virtually inevitable.

FPC's expertise is thus required to determine the existence of an anticompetitive price squeeze prior to the consideration of appropriate remedies by any forum. Thus, in *Pennsylvania Power & Light Co.*, FPC Docket No. E-8927, Order Affirming Initial Decision at 5 (March 24, 1977), FPC ruled that

"[t]here is no evidence of any anticompetitive purpose, the [wholesale] rates are at the bottom of the zone of reasonableness and it appears that there still is and can be competition for industrial loads."

Manifestly, if there is no anticompetitive price squeeze, an issue that FPC is required to resolve under *Conway*, there is no need for consideration by the district court of any of Municipalities' price squeeze allegations.<sup>16</sup>

If FPC should find, in accord with the detailed procedures for rendering Conway determinations set forth in its Order No. 563, issued on March 21, 1977, 17 that an anticompetitive price squeeze does exist, FPC has the power under Conway to provide a remedy by adjusting the wholesale rates at least to the lower range of the zone of reasonableness. In Carolina Power & Light Co., FPC Docket No. ER 76-495 (Phase II), Initial Decision of the Administrative Law Judge at 82 (Sept. 7, 1977), certain municipalities which there intervened conceded that their proposed cost of service adjustments, if adopted, would eliminate the price squeeze of which they complained. Thus, given the remedial powers of FPC as provided in Conway, there is

<sup>16.</sup> In order to prevail in this action, plaintiffs would have to establish that I&M has reached a decision artificially "to depress certain retail revenues" (426 U.S. at 279), or that I&M artificially raised its wholesale rate, a rate that FPC has full power to adjust within the zone of reasonableness.

<sup>17. 42</sup> Fed. Reg. 16131 (March 25, 1977), rehearing denied, May 20, 1977, 42 Fed. Reg. 27574 (May 31, 1977).

no way to know whether a price squeeze exists, or whether FPC's power to remedy such a price squeeze is adequate, until FPC has fixed the wholesale rate. While we believe that it would disregard the proper allocation of functions between FPC and the district court to have FPC forced to operate under the threat of a stay which would be naturally disruptive of orderly administrative procedure, I&M submits that, at the very least, the district court should stay its hand pending FPC determination of the threshold questions that FPC is mandated to resolve under *Conway*.

#### Conclusion

The decision of the Court below ignores what I&M submits to be the manifest, although unstated import of Conway, that the Federal Power Commission (now the Federal Energy Regulatory Commission) has exclusive or at least primary jurisdiction over anticompetitive price squeeze allegations. The Court below also failed to give proper weight to the rulings of this Court in Silver, Gordon and NASD from which emerge the principle that the existence of pervasive regulatory controls, whether exercised or not, ousts the district court of its antitrust jurisdiction. The decision of the court below will lead to a massive duplication of effort between federal courts and agencies equipped to deal with public utility rates. The decisions of this Court clearly provide the self-protective guides for avoiding so harmful and egregious a result, and the court below erred in failing to invoke and apply them. The Court should review this result and reverse.

We take the liberty of suggesting that if this Court should consider the errors below so clear as not to require the Court to put this case on its calendar for oral argument, this matter can be effectively handled by summary reversal, as was done in Federal Power Commission v. United Gas Pipe Line Co., 393 U.S. 71 (1968), with appropriate directions to the Court below.

#### Respectfully submitted,

WHITNEY NORTH SEYMOUR

Counsel for Petitioner

One Battery Park Plaza

New York, New York 10004

(212) 483-9000

Of Counsel:

RICHARD M. DICKE
PETER J. SCHLESINGER
DENNIS G. JACOBS
SIMPSON TEACHER & BARTLETT

THOMAS W. YODER
LAWRENCE A. LEVY
LIVINGSTON, DILDINE, HAYNIE & YODER

November 14, 1977

# APPENDIX

#### Text of Statutes Relied On

Federal Power Act §205, 16 U.S.C. §824d:

"§824d. Rates and charges; schedules; suspension of new rates.

- "(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
- "(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
- "(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

#### Test of Statutes Relied On

- "(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.
- "(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classifica-

#### Test of Statutes Relied On

tion, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilitities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

#### Federal Power Act §206(a); 16 U.S.C. 824e(a):

- "§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission.
- "(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged,

#### Test of Statutes Relied On

or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

#### Sherman Act §2, 15 U.S.C. §2:

"§2. Monopolizing trade a misdemeanor; penalty.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

#### Clayton Act §4, 15 U.S.C. §15:

"§15. Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

#### Test of Statutes Relied On

Clayton Act §15, 16 U.S.C. §26:

"§26. Injunctive relief for private parties; exception.

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided. That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

# Order and Judgment of the Court of Appeals

OPINION BY JUDGE CUMMINGS

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
August 16, 1977

Before:

Hon. WALTER J. CUMMINGS, Circuit Judge Hon. Philip W. Tone, Circuit Judge Hon. William J. Bauer, Circuit Judge

No. 76-2226

CITY OF MISHAWAKA, INDIANA, et al.,

Plaintiffs-Appellees,

vs.

Indiana & Michigan Electric Company,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana

South Bend Division

No. S-74-72-Civil

Judge Grant and Judge Sharp

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders of the said District Court in this cause appealed from on May 1, 1975, and October 22, 1976, are affirmed, with costs, in accordance with the opinion of this court filed this date.

#### Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-2226

CITY OF MISHAWAKA, INDIANA, et al.,

Plaintiffs-Appellees,

v.

Indiana & Michigan Electric Company,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. S-74-72-Civ.—Robert A. Grant and Allen Sharp, Judges.

ARGUED APRIL 28, 1977—DECIDED AUGUST 16, 1977
Before Cummings, Tone and Bauer, Circuit Judges.

CUMMINGS, Circuit Judge. One Michigan and nine Indiana municipalities, members of the Indiana & Michigan Municipal Distributors' Association, filed this antitrust action against defendant, a vertically integrated electric power company which generates, transmits and delivers electric power both to its wholesale customers, including

plaintiffs, as well as directly to its own retail customers. Each plaintiff operates its own electric utility through which it purchases wholesale electric power from defendant, then selling and distributing it at retail to industrial, commercial, and residential customers within its corporate limits and in nearby areas.

According to the complaint, defendant is the only firm within its service area that transmits and wholesales electric power and is the plaintiffs' only outside source of supply for wholesale electric power. Eight of the plaintiffs depend on defendant for all the electric power they distribute and sell to their retail customers. The other two plaintiffs, which operate generating facilities, depend on defendant for more than 90% of their requirements for electric power distribution and sale to their retail customers.

Plaintiffs alleged that defendant dominates and controls the distribution and sale of retail electric power within its service area and has acquired four of the twenty municipal electric utilities there since 1957 and unsuccessfully attempted to acquire a fifth. According to plaintiffs,

"The defendant company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated electric systems serve retail customers in fewer than 10%." (Complaint §6.)

Plaintiffs have charged defendant with intentionally monopolizing and attempting to monopolize interstate trade and commerce in the distribution and sale of retail electric power, in violation of Section 2 of the Sherman Act (15 U.S.C. §2), by requiring them and other municipalities to

# Opinion of the Court of Appeals

pay since January 13, 1973, a new wholesale price which is substantially higher than the retail price it charges its own industrial customers. Because of this "price squeeze," the municipalities cannot sell electric power to their own industrial customers at prices that compete with defendant's retail prices. One consequence is that defendant may be able to lease Fort Wayne, Indiana's electric utility system for 35 years. Fort Wayne is the largest city within the defendant's service area which still operates its own electric utility. Other alleged consequences of the new wholesale price are:

- 1. Plaintiffs' ability to compete with defendant for retail and industrial customers has been impaired.
- 2. In those municipalities that have absorbed the difference between defendant's higher wholesale price and its lower retail industrial prices, pressure has been put on the municipalities to sell or lease their electric utilities to defendant rather than to continue generating operating losses.
- 3. In those municipalities that increase their industrial retail prices to the level of the defendant's higher wholesale price to them, the disparity between the municipalities' higher retail industrial prices and defendant's lower retail industrial prices threatens to cause the municipalities' industrial customers to exert pressure on the municipalities to sell or lease their electric utilities to defendant so that those customers can purchase electric power at defendant's lower prices.

By a September 30, 1976, amendment to the complaint, plaintiffs alleged that since July 27, 1976, defendant required them and other municipalities to pay a new higher

wholesale price for electric power, resulting in their financial inability to buy power at the defendant's new wholesale price and sell it to industrial customers at prices competitive with defendant's retail prices. In its answer to this amendment, defendant admitted that the Federal Power Commission permitted its higher wholesale rates to become effective on July 27, 1976, subject to refund.<sup>1</sup>

Plaintiffs requested a declaratory judgment that defendant had violated Section 2 of the Sherman Act and an injunction under Section 16 of the Clayton Act (15 U.S.C. §26) against violating it in the future. They also sought an order ending defendant's present rate structure which requires plaintiffs to pay a higher wholesale price to defendant for electric power than the retail prices at which it sells to its own industrial customers. Under Section 4 of the Clayton Act (15 U.S.C. §15), plaintiffs claimed damages in excess of \$1 million before trebling. The municipalities also sought attorneys' fees.

Subsequently, on May 1, 1974, defendant filed a motion to dismiss the complaint for lack of subject matter jurisdiction or for failure to state a claim or, in the alternative, to stay the court proceedings until the Federal Power Commission should conclude its regulatory proceedings involving defendant's post-January 13, 1973, rates to wholesale customers. Defendant and the Indiana & Michigan Municipal Distributors' Association (of which plaintiffs are members) were parties to these proceedings before the Commis-

#### Opinion of the Court of Appeals

sion. On May 1, 1975, Judge Grant denied that motion and at the same time filed an extensive opinion disposing of defendant's arguments (App. 11-29). In the opinion, Judge Grant noted that in March 1972, the Indiana Public Service Commission set defendant's new higher retail rates and that in March 1973, the Michigan Public Service Commission approved an increase in defendant's retail rates. Both of these actions were instituted by defendant's July 30, 1971, petitions for new rates filed with each of the state Commissions. In June 1972, defendant submitted proposed increases in the rates charged to its wholesale customers to the Federal Power Commission. The new rates were later made effective on August 13, 1972,2 but the Commission provided that if it determined that said rates were unjust or unreasonable, it might order defendant to refund the excess to its customers. The Commission began its hearings on the lawfulness of these new wholesale rates on January 31, 1974.

Defendant contended that its retail rates, set by the state utility commissions, were immune from attack under the Sherman Act. The court held that under Parker v. Brown, 317 U.S. 341, it did not have authority to intrude upon the Indiana and Michigan Public Service Commissions' approval of defendant's retail rates. However, after distin-

In June 1975, defendant filed an answer containing three counterclaims against plaintiffs. That pleading need not be summarized herein because it is irrelevant to the issues involved on the interlocutory appeal.

<sup>2.</sup> On August 13, 1972, the Commission suspended the use of these rates until January 13, 1973, the date involved in the original complaint herein. After an appeal to the District of Columbia Circuit by defendant on the grounds that the effective date should be July 14, 1972, the Court proclaimed July 14, 1972, to be the effective date but only allowed defendant to collect the difference between its old and new rates from December 14, 1972, onward. *Indiana & Michigan Electric Co. v. Federal Power Commission*, 502 F.2d 336 (D.C. Cir. 1974), certiorari denied, 420 U.S. 946.

guishing Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, and Pennsylvania Power Company v. Federal Power Commission, 193 F.2d 230 (D.C. Cir. 1951), affirmed, 343 U.S. 414, the Court found that it had jurisdiction over the subject matter of the action, citing Georgia v. Pennsylvania R. Co., 324 U.S. 439; Keogh v. Chicago & N.W. Ry., 260 U.S. 156; and Otter Tail Power Co. v. United States, 410 U.S. 366. In particular, Judge Grant held that

"Just as the Court in Otter Tail was hesitant to conclude that the authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations, this Court cannot conclude that the Federal Power Commission's authority to review rates was an intended substitute for the anti-trust laws in a situation involving the alleged monopolizing effect of a dual price structure." (mem. op. at 16).

Judge Grant stated that if the Federal Power Commission finally found the defendant's new wholesale rates to be just, the court might be forced to order defendant to initiate a new rate structure, eliminating the dual price system of higher wholesale prices relative to retail prices. On the other hand, if the Commission should find the new wholesale rate to be unjust, he might only enjoin defendant from any future dual system. Consequently the court held that plaintiff had not failed to state a claim upon which relief could be granted.

In conclusion, Judge Grant refused to stay the action until the Federal Power Commission should hand down

#### Opinion of the Court of Appeals

a final decision because "the lawfulness of the defendant's wholesale rate is not determinative of the issue before" the court (mem. op. 19). The district court ended its opinion as follows:

"Since it is the initiation of a monopolistic structure that the Court is asked to prohibit and not the rate itself, final action by the agency will not by itself prohibit the problem although it may alleviate it for a time. Furthermore, if the Court found that damages were recoverable in this case and that in determining the damages the final decision of the Commission was necessary and the Commission has not yet ruled on the lawfulness of the wholesale rate the present action could at that time be stayed by the Court for the purpose of awaiting the Commission result." (Id.)

Thereafter the case was reassigned to Judge Sharp. On October 22, 1976, he denied defendant's motion to reconsider Judge Grant's order of May 1, 1975. Thereupon, an interlocutory appeal was taken to this Court and allowed pursuant to 28 U.S.C. §1292(b). We affirm.

#### I. Exclusive Jurisdiction

When the district court handed down its opinion refusing to dismiss the complaint and to grant a stay, the Federal Power Commission had ruled that this alleged dual price system and its anti-competitive effects were beyond its jurisdiction (mem. op. 14).<sup>3</sup> However, in Federal Power

(footnote continued on next page)

The Indiana & Michigan Municipal Distributors' Association sought review of the FPC decision to eliminate from the case all testimony, exhibits and consideration of the price squeeze issue.

Commission v. Conway Corp., 426 U.S. 271, the Supreme Court subsequently held that such an anti-competitive price squeeze between jurisdictional wholesale rates and non-jurisdictional retail rates should be considered by the Commission in fixing rates for interstate wholesale sales. Speaking for a unanimous Court, Mr. Justice White said the Commission can take retail rates into consideration in setting the wholesale rate even though they are outside its jurisdiction. 426 U.S. at 279-282. The Court explicitly approved the District of Columbia Circuit's conclusion that

"When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves. There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers. 167 U.S. App. D.C. at 53, 510 F.2d at 1274. (Footnote omitted.)" 426 U.S. at 279.

Appealing to the District of Columbia Circuit, IMMDA requested the FPC to confess error in light of Federal Power Commission v. Conway Corp., 426 U.S. 271, and obtain a remand to consider the price squeeze issue. On August 13, 1976, the FPC filed such a request. In an initial decision of August 19, 1976, in the wholesale rate case commenced in June 1972, the administrative law judge recommended that the price squeeze issue be resolved in further proceedings. This was in line with the parties' agreement to dispose of the 1972 wholesale rate case by a financial settlement based on the initial decision without resolving the anti-competitive allegations (Pl. Br. 9-10). These facts were brought to the district court's attention before its October 22, 1976, denial of defendant's Motion to Reconsider, Vacate, Set Aside and Amend [the] Court's Order of May 1, 1975 (D. Br. 5-6). The settlement was approved by the FPC in an order of June 1, 1977.

#### Opinion of the Court of Appeals

Such a remedy would only operate against the jurisdictional rate.4

Nothing in the Supreme Court's opinion in Conway suggests exclusive jurisdiction, as defendant concedes (D. Br. 32). Indeed, Conway suggests that the FPC rem-

4. A new regulation, 18 C.F.R. §2.17, entitled "Price discrimination and anti-competitive effect (price squeeze issue)," was issued on March 21, 1977, to implement the Commission's mandate under Conway. In the order issuing the regulation, provision was made for the state commissions to be kept informed but, of course, no suggestion was made to force them to change the non-jurisdictional retail rates:

"Both the Federal Power Commission and the NARUC [National Association of Regulatory Utility Commissioners] Board [of Consultants] recognize that state commission participation in rate proceedings before the Commission, particularly in cases involving retail and wholesale rate comparisons, would be desirable, and awareness of the state commission's views on price squeeze issues would be valuable. We, therefore, adopt the NARUC Board's recommendation that in all cases where price squeeze is at issue, the state commission, agency or body which is responsible for regulation of retail rates in the state affected shall be included in the service list maintained by the Secretary under 18 CFR 1.17(c) as if that state commission, agency or body had intervened in the proceeding. In proceedings where the state commission does not take an active part, the NARUC Board recommends that the Commission encourage FPC staff to confer with state commission staff for the purpose of acquiring information particularly within the knowledge of the state commissions in order to gain a more complete picture of the competitive relationship of respective wholesale to retail rates." (D. Rep. Br. App. A8-A9.)

5. Defendant points to one sentence of dicta in Judge Leventhal's opinion for the D.C. Circuit in Conway arguably to the contrary:

"The FPC's position would leave a regulatory gap—no institution would have authority to consider an undue preference between wholesale and retail rates, even where that preference was deliberately instituted for the purpose of clogging competition, and to reduce interstate wholesale rates." 510 F.2d at 1272.

Judge Leventhal's opinion does not consider antitrust aspects at all. When read in the context of the opinion as a whole, it is clear that the "institution" meant a regulatory administrative body.

edy is limited to setting the jurisdictional rate somewhere above the lower boundary of the zone of reasonableness. A rate set so low that it would fail to recoup fully allocated wholesale costs seems to be beyond the Commission's power. 426 U.S. at 278. If the retail rates have been set so low by the state utility commissions that a price squeeze could only be fully remedied by setting the wholesale rates below the lower boundary of the zone of reasonable recovery for fully allocated costs, the squeeze would go unremedied to the extent a wholesale rate set at the lower boundary of the zone of reasonableness did not cure the problem. Although Conway was brought to the district court's attention, it refused to vacate its order declining to dismiss the complaint and to stay the action.

Subsequent to Conway, the Supreme Court decided Cantor v. Detroit Edison Co., 428 U.S. 579, refusing to exempt Detroit Edison's light bulb exchange program from the federal antitrust laws even though it was an approved element of the state rate tariff filed with the Michigan Public Service Commission. Given a complaint that details conduct which, if true, would constitute a substantive antitrust violation, Justice Stevens described two classes of situations involving the interaction of state and federal law where Sherman Act jurisdiction would, nevertheless, be defeated. First, Congress in passing the Sherman Act may not have intended for the Act to apply, in the first instance, to state action. Parker v. Brown, 317 U.S. 341. Secondly, although originally intended to be covered by the Sherman Act, certain conduct may have become exempted from the Act.

#### Opinion of the Court of Appeals

In a section of his opinion commanding only a four-judge plurality, Justice Stevens concluded that in *Parker* the

"only Sherman Act issue decided was whether the sovereign State itself, which had been held to be a person within the meaning of §7 of the statute, was also subject to its prohibitions." 428 U.S. at 591.

As in Cantor, the plaintiff municipalities have named no state officials or state agencies in the complaint, and there is no claim that any state action violated the antitrust laws. See 428 U.S. at 591-592. Thus under the plurality opinion, Parker v. Brown does not even arguably apply to the facts of our case. Nor do Chief Justice Burger or Justice Blackmun's concurrences in Cantor give defendant solace. The challenged activity here is a dual rate structure. The state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant. The price squeeze has not been blessed by Indiana or Michigan. The fact that the district court has no authority to maintain a direct attack on the defendant's retail rates does not alter the reality that the state commissions have in no way placed a badge of approval on the defendant's dual rate structure. Consequently, defendant's conduct is not immunized under Parker v. Brown.

Having decided that the Sherman Act applies in the first instance to the conduct at issue here, we must decide whether an exemption nonetheless has been worked. Justice Stevens, in a portion of *Cantor* subscribed to by a majority of the Court, suggested two geneses for such an exemption. First, it might be unjust to hold a private citizen liable for conduct imposed by the direct command of the

sovereign.<sup>6</sup> Secondly, if the sovereign is already regulating an area, Congress may not have intended to superimpose the antitrust laws as an additional and perhaps conflicting regulatory scheme.<sup>7</sup>

In City of Shakopee v. Northern States Power Co., Civ. No. 4-75-591 (D. Minn. 1976), a post-Cantor case involving a virtually identical dual rate structure creating a price squeeze between the wholesale and retail sale of electric power, Judge Lord concluded that no exclusive jurisdiction existed in the Federal Power Commission because an exemption from the antitrust laws could not be implied. Judge Lord interpreted the first genesis for exemption under Cantor to be based on the reasoning that

#### Opinion of the Court of Appeals

"if an anticompetitive practice is the product, at least in part, of the company being regulated and could be avoided if the company chose to do so, then the anticompetitive condition is in reality the work of that company and is not 'necessary' to the functioning of the regulatory scheme and will not be immunized from antitrust liability." (mem. op. 6.)

Accordingly, the court noted that, as here, defendant Northern States Power Co. could have avoided the alleged monopolistic position by "tailoring its applications to allow for competitive "wholesale" and "retail" power rates" (mem. op. 7) and that, given such company autonomy, this position was not "necessary" to the functioning of the regulatory scheme.

With respect to implying a repealer of the antitrust acts, Judge Lord began with the now settled axiom that after Otter Tail Power Co. v. United States, 410 U.S. 366, "there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." Cantor, supra, at 596 n. 35. Since the antitrust laws are not generically superseded by the regulation of electric utilities, the only question open to debate is whether "the particular application of the [antitrust laws] is irreconcilably repugnant to the operation of the regulatory scheme." Id. Judge Lord decided that there was "little or no apparent conflict be-

<sup>6.</sup> Although the facts of *Cantor* limited Justice Stevens' consideration to the state sovereign, a finding that conduct arising from the command of the federal sovereign is subject to antitrust liability may be assumed to be similarly unjust.

<sup>7.</sup> If the sovereign is the federal government, the question reduces to the traditional problem of exclusive jurisdiction. Here the conceptual framework is a federal statute post-dating the Sherman Act lodging the responsibility for regulating the conduct in issue in some federal agency and impliedly repealing the application of the Sherman Act as to this specie of conduct.

If the sovereign is the state government, an implied repealer of a federal law such as the Sherman Act is of course foreclosed by the Supremacy Clause. Presumably, the exemption is created here on the conceptual framework that Congress did not intend the Sherman Act to apply to areas of the economy pervasively regulated by the states. Unlike the Parker exclusion, this exemption would not derive from the character of a state's involvement with certain conduct but rather with the quality and scope of the regulatory mechanism imposed by the state over such conduct. The state commissions of Indiana and Michigan are not alleged to have any power to regulate the price squeeze in any sense. Since this conduct is not being regulated by the state commissions, Sherman Act jurisdiction of course is not ousted in favor of state regulation. The defendant does not contend otherwise.

<sup>8.</sup> In order to imply a general exemption for an economic sector of an industry, mere conflicting standards are not enough. This aspect of a regulatory agency's jurisdiction must be "imperative in the continued effective functioning" of the regulatory scheme over the industry as a whole. Cantor, supra, at 596-597 n. 36 and n. 37. Since Cantor distinguished and refused to apply Gordon v. New York Stock Exchange, 422 U.S. 659, perhaps defendant's principal case on this ground, no purpose would be served in discussing it further here. See 428 U.S. at 596-597 n. 36.

tween applying the antitrust laws to the type of conduct complained of here and the smooth and efficient functioning of the FPC's regulatory system" (mem. op. 5). As in Shakopee, the price squeeze alleged in our case

"is not between rates set by one regulatory agency, as was the case in Georgia [v. Pennsylvania R. Co., 324 U.S. 439], but rather is between the 'wholesale' rate set by the FPC and the 'retail' rate over which the FPC has no jurisdiction. Put simply, under these circumstances, antitrust immunity is not 'necessary' to the functioning of the regulatory process because the discrimination is 'external' to that process. The FPC does not control both ends of the discriminatory conduct." (mem. op. 7 n. 6.)

If plaintiff proves it is entitled to relief on the Sherman Act claim asserted in its complaint, the Federal Power Commission's regulatory process would not be disturbed by the court's awarding damages for past anti-competitive conduct or by enjoining future anti-competitive conduct by defendant in making and promoting its rate applications. Thus relief could be granted without the district court's actually becoming involved in the process of setting rates.

Indeed the Federal Power Commission has conceded that it does not have exclusive jurisdiction over conduct such as that alleged here. Following Judge Lord's denial of Northern States Power's motion to dismiss, Shakopee is proceeding, we are advised, before the district court and the Federal Power Commission in tandem. On May 23, 1977, the Federal Power Commission released an order in Northern States Power Company, FPC Docket No. ER 76-818, stating that the Commission's examination of the

#### Opinion of the Court of Appeals

alleged price squeeze would not affect the district court action in Shakopee because

"That action seeks damages for allegedly anticompetitive activity that occurred in the past. As the District Court noted in its October 18, 1976, order denying Northern States' motion to dismiss, should Shakopee prove itself entitled to relief the regulatory process would not be disrupted by an award of damages for past conduct nor by an enjoining of certain future conduct. These remedies are beyond our jurisdiction as we cannot look to past rate schedules and, if a price squeeze were found, we could not take any remedial action. Accordingly there is no alternative to this issue being litigated in both forums, one concerning itself with present rates and the other with past rates and possible future conduct."

This ruling equally applies here. Therefore, it is clear that defendant is wrong in asserting that the Federal Power Commission has exclusive jurisdiction over this matter.

#### II. Primary Jurisdiction

The more difficult question is whether the Federal Power Commission has primary jurisdiction over the price squeeze. Primary jurisdiction is concerned with the proper allocation of responsibilities between the administrative agencies and the courts. "Even when [antitrust actions] and remedies survive and the agency in question lacks the power to confer immunity from [antitrust] liability, it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure

'[u]niformity and consistency in the regulation of business entrusted to a particular agency' or where

"'the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' Far East Conference v. United States, 342 U.S. at 574-575." (Nader v. Allegheny Airlines, 426 U.S. 290, 303-304).

The defendant argues that since "some facets of the dispute \* \* are within the statutory jurisdiction of the [Federal Power] Commission," Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 302-here the Conway-dictated duty to set the jurisdictional rate with an eye to any price squeeze between it and the non-jurisdictional rate—the Federal Power Commission must be deemed to preempt antitrust jurisdiction. However, that position was also foreclosed by Otter Tail Power Co., supra. There only the dissenting Justices would have required the antitrust court to defer to the Commission proceeding. 410 U.S. at 392-395. The other Justices affirmed a decree under Section 2 of the Sherman Act (except in one respect immaterial here) without requiring a stay where there was only a potential conflict between the federal judicial decree and a future order of the Federal Power Commission. 410 U.S. at 376-377. Any suspicions that the 4-3 vote in Otter Tail impairs its authority seem wholly unwarranted in light of the Cantor majority's repeated citations of it with approval. See

#### Opinion of the Court of Appeals

also Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 758.

Even if it cannot be maintained as a matter of course that as between the dual jurisdiction in the district court and in the Federal Power Commission the jurisdiction in the Commission is primary, it may be that deferral to the Commission makes sense as a matter of judicial administration. If a significant inconsistency between the antitrust action and the regulatory scheme which was certain to arise could be specifically shown to be avoidable by letting the Commission proceed first, deferring to the Commission would be advisable. In addition, if the "adjudication of th[e] dispute by the Commission promises to be of material aid in resolving the [antitrust] immunity question," Ricci, supra, at 302, or will advance the Court's fact-finding capacity, it may be desirable to hold the antitrust action in abeyance pending the resolution of the proceeding before the Commission. Nevertheless, we hold that the Federal Power Commission does not have primary jurisdiction over the price squeeze.

#### A. Uniformity

Where uniformity and consistency of the regulatory scheme are at stake, primary antitrust coverage does not necessarily follow even when there is a statutory grant of express immunity as to certain other conduct approved by a federal agency. Mt. Hood Stages, Inc. v. Greyhound Corp., — F.2d —, — (9th Cir. 1977) (slip op. at 1200). Where there is no statutory grant of antitrust im-

munity, so that the argument that Congress intended "conduct not within the exemption [to remain] subject to the antitrust laws" is foreclosed (id.), the uniformity interests in primary administrative jurisdiction are correspondingly strengthened. But as Chief Judge Browning added:

"Conduct is not immunized merely because it falls within the jurisdiction of the regulatory agency, as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy, as it did in this instance." (Id.)

Indeed, as noted in Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 758-759, the Federal Power Act does not preclude the operation of the antitrust laws even though the Federal Power Commission is required to give weight to antitrust policy. There Justice Blackmun, speaking for six members of the Court, declared that the Federal Power Commission should consider antitrust and anti-competitive issues before authorizing the issuance of securities under Section 204 of the Act (16 U.S.C. (824c) in order to establish "a first line of defense against those competitive practices that might later be the subject of antitrust proceedings" (411 U.S. at 760). This of course does not mean, as defendant urges (Reply Br. 5-6n. \*), that a district court which, as here, has assumed jurisdiction over a price squeeze two years before the Commission agreed to consider it must withhold relief that (as the district court has already indicated) will not interfere with the Commission's rate-making function. In fact, primary administrative jurisdiction based on uniformity grounds is not even an issue in such a factual setting.

#### Opinion of the Court of Appeals

As in Georgia v. Pennsylvania R. Co., 324 U.S. 439, 455, 457, plaintiffs are seeking to enjoin conduct violative of the Sherman Act and to recover damages therefor. That relief, if appropriate to remedy a proven violation of the antitrust laws, would cause defendant to end its purported current price squeeze practice but need not interfere with rates already approved by the state and federal commissions. The antitrust and regulatory régimes accommodate and supplement each other in order to prove full protection from anti-competitive practices. Here too the remedies afforded under the two statutes can be meshed. As in Mt. Hood Stages, supra, — F.2d at — (slip op. 1201), no plain repugnancy exists between this federal regulatory statute and the Sherman Act as applied to defendant's conduct, nor is it necessary to exempt that conduct from antitrust restraints to make the regulatory statute work. In truth, as recognized as long ago as Consolidated Gas, Electric Light & Power Co. v. Pennsylvania Water & Power Co., 194 F.2d 89, 97-99 (4th Cir. 1952), certiorari denied, 343 U.S. 963, Part II of the Federal Power Act, which contains Section 205 involved in this case, is not repugnant to the antitrust laws and therefore does not supersede them.

In the court below, defendant in effect recognized that the Commission cannot afford the requested relief to plaintiffs because defendant stated it was

"aware of the Commission's inability to remedy a claim of anti-competitive behavior, premised on the differences in rates charged by [defendant] I & M to its wholesale and retail customers, by raising the retail rates to the level of the wholesale rates" (mem. op. 9).

Nor does Conway guarantee that the price squeeze may be fully remedied by severely depressing wholesale rates to

eliminate the price squeeze. This is because, as we have demonstrated above, the Federal Power Commission cannot set wholesale rates below the lower boundary of the zone of reasonableness even if the price squeeze could not be eliminated without setting the wholesale price below the zone of reasonableness limit. Primary jurisdiction is not a doctrine that requires an exercise in futility. See Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 686. Thus antitrust relief is needed for full protection from the anti-competitive conduct alleged in the complaint.

If plaintiffs prove their case, instead of interfering with any rates approved by the Federal Power Commission, in addition to possible damages, the district court would presumably order defendant to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendant's industrial customers. The court would thus not be affording a remedy that would "starkly conflict with the explicit statutory mandate of the Federal Power Commission \* \* \* [or] improperly preemp[t] the jurisdiction of the Federal Power Commission \* \* \*." Otter Tail Power Co., supra, 410 U.S. at 395 (concurring and dissenting opinion of Justice Stewart). As shown from the opinion below and from the opinion Shakopee, supra, the district court intends to apply the antitrust laws "to the public utility industry only to the extent that the antitrust claims asserted are not within the reach of the regulatory agency's supervision," the very standard recommended by defendant (Br. 21). Under Otter Tail Power Co., supra, and Gulf States Utilities Co., supra, in fashioning any relief that may be warranted under the Sherman

#### Opinion of the Court of Appeals

Act, the judiciary must be careful to avoid or resolve any inconsistency with Section 205 of the Federal Power Act. We are confident that the district court will observe this stricture.

Indeed the opinions of the district courts in this case and in Shakopee show that they do not intend to interfere with the Federal Power Commission's jurisdiction, because if the Commission should find the respective defendant's higher wholesale rates to be just, the courts would, on proof of violations of Section 2 of the Sherman Act, order the defendants to initiate new rate structures eliminating the dual price system of higher wholesale prices. If the Commission should find the present wholesale rates to be unjust, then the courts would only enjoin the defendants from future dual systems violative of the Sherman Act. Both district courts noted too that it would not disrupt the regulatory process to award damages for any past anti-competitive conduct proved at trial. Therefore, a stay is unnecessary to avoid a clash between the antitrust laws and the Federal Power Act.

# B. Agency Expertise.

Nor is a stay warranted on the grounds that the Federal Power Commission's expertise will materially advance the district court's fact-finding capacity or aid the district court's determination of the extent of any possible antitrust immunity.

As amici curiae "Illinois Municipals." have stated, Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, has

<sup>9.</sup> Cities of Batavia, Geneva, Naperville, Rock Falls and St. Charles, Illinois.

no bearing here because the district court does not need to know the Commission's expert views on what constitutes a just and reasonable rate "as a prerequisite to a determination of whether defendants' activities violate the antitrust laws" (Br. 24). Also, the Ricci Court thought the Commodity Exchange Act probably limited the applicability of the antitrust laws there (409 U.S. at 302-304) whereas no such limitation exists here. Cantor, supra; Otter Tail Power Co., supra. Under the facts of the instant case, where the district court has first asserted jurisdiction over the antitrust proceedings, it may continue its probe. California v. Federal Power Commission, 369 U.S. 482; Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co., 184 F.2d 552, 562-566 (4th Cir. 1950), certiorari denied, 340 U.S. 906.

#### III. Discretionary Stay

Assuming that a discretionary stay could be appropriate even when primary jurisdiction is not in the Federal Power Commission, the district court certainly did not abuse its discretion here. Indeed, the equities weigh heavily in favor of the plaintiff municipalities. The Illinois Municipals point out that the district court should be permitted to proceed in order to avoid the typical lengthy delays that occur in processing wholesale rate increases under Section 205 of the Federal Power Act (16 U.S.C. §824d). Under that provision, a public utility files its rate increase application no less than 30 days before the effective date thereof, and the Commission typically suspends the proposed rate from one day

#### Opinion of the Court of Appeals

to five months, with refunds required if the rate is found to be above the statutory "just and reasonable" standard. The wholesale rate increase in the present case stems from a June 13, 1972, application by defendant, and the case was not terminated in the Commission until it approved a settlement on June 1, 1977, a span of five years. Except for the settlement, the case would still pend before the Commission.

Thus far, the Commission has never rejected a rate filing on price squeeze or other antitrust grounds, and there is no limit on the number of filed increases that may be in effect at the same time under Section 205. Simply by filing an anti-competitive increase and waiting for time to pass, a public utility like defendant can place a price squeeze on wholesale customers. As the Commission has stated, "electric utilities are permitted to file virtually any level of costs and rates and after a period of suspension charge those rates subject to refund, pending Commission decision." FPC Order No. 487, 50 FPC at 127 (1973).

Under this procedure, the price squeeze can continue between the time the Commission allows the rates to go into effect and its final order, for the new Conway remedy as to price squeezes does not become effective until then. Thus if a stay were granted to defendant, plaintiffs and customers in similar positions would be unable to secure any relief from price squeezes like this until the Commission finally approved the filed rates. As the Illinois Municipals have picturesquely put it:

"Delay, combined with the multiple rate increases, could mean that the customer has been put out of

business by his supplier-competitor. You cannot give refunds to a corpse." (Br. 27-28.)

Furthermore, the Commission would be unable to afford complete relief because the Federal Power Act does not provide for damages or for an injunction against a utility violating the antitrust laws. Thus a stay in this case would excuse defendant's alleged non-compliance with the antitrust laws for a completely unnecessary length of time.

#### IV. Disposition

At oral argument, we were advised that on January 14, 1977, defendant requested the Federal Power Commission to approve a negotiated settlement between it, these plaintiffs and others for the period from January 13, 1973, to July 27, 1976, when defendant's new wholesale rate schedule became effective. This settlement was approved on June 1, 1977. See note 3 supra. Upon remand, the district court will have to determine whether this settlement agreement has mooted any of the antitrust claims in this case. Of course, the claims stemming from the July 27, 1976, higher wholesale prices are still active.

While we are holding that the district court need not stay further proceedings herein, we agree with Judge Grant that if the district court should ever find it necessary to ascertain particular Commission action in order to decide the exact scope of antitrust damages, or for other purposes, the court may then stay its hand for the purpose of awaiting the Commission result (mem. op. 19).

The orders of May 1, 1975, and October 22, 1976, are affirmed.

## Order and Memorandum of the District Court, May 1, 1975

IN THE

#### UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

Civil Action No. S 74-72

CITY OF MISHAWAKA, INDIANA,

CITY OF NILES, MICHIGAN,

CITY OF COLUMBIA CITY, INDIANA,

CITY OF BLUFFTON, INDIANA,

CITY OF GARRETT, INDIANA,

CITY OF GAS CITY, INDIANA,

Town of Frankton, Indiana,

Town of Warren, Indiana,

Town of New Carlisle, Indiana, and

Town of Avilla, Indiana,

Municipal Corporations,

Plaintiffs,

v.

Indiana & Michigan Electric Company, a Corporation,

Defendant.

#### ORDER

The defendant, Indiana & Michigan Electric Company, filed a motion to dismiss the above entitled action pursuant

to Rule 12, F.R.C.P., or, in the alternative, that the proceeding be stayed in the event that defendant's motion to dismiss be denied.

The defendant seeks to dismiss on the grounds that this Court lacks jurisdiction over the subject matter of this action and that the complaint fails to state a claim upon which relief may be granted.

The defendant has also filed a motion for leave to file a supplementary affidavit in support of its motion to dismiss or in the alternative to stay, which motion is DENIED for the reasons stated in the following Memorandum.

After reviewing defendant's motion, the parties' briefs, and oral argument having been held,

IT IS THE ORDER OF THE COURT that defendant's motion to dismiss or in the alternative to stay be, and the same is, hereby DENIED.

ROBERT A. GRANT

District Judge

ENTER: May 1, 1975

#### MEMORANDUM

The plantiffs, City of Mishawaka, Indiana; City of Niles, Michigan; Cities of Columbia City, Bluffton, Garrett, and Gas City, Indiana; and the Towns of Frankton, Warren, New Carlisle, and Avilla, Indiana, filed the present action on March 25, 1975, against Indiana & Michigan Electric Company (hereinafter I & M). Plaintiffs have based jurisdiction of this action on Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, and allege that the defendant, I & M, has monopolized and attempted to monopolize inter-

#### Order and Memorandum of the District Court

state trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

Plaintiffs in their complaint state that they are municipalities which operate their own electric distribution systems; that they are within the service area of the defendant, I & M; and that they sell and distribute the electric power at retail to industrial, commercial, and residential customers within their corporate limits and in nearby areas.

Plaintiffs describe I & M as a vertically integrated electric power company which generates electric power, transmits the power throughout its service area, and delivers the power to its wholesale customers, including the plaintiffs, and also directly to its retail customers.

Plaintiffs allege that the defendant company is the only firm within their service area engaged in the business of transmitting and selling electric power at wholesale and, thus, the only outside source of supply for wholesale electric power available to them. The complaint states that plaintiffs, Mishawaka, Indiana; Columbia City, Indiana; Garrett, Indiana; Gas City, Indiana; Frankton, Indiana; Warren, Indiana; New Carlisle, Indiana; and Avilla, Indiana, depend on the defendant for all of their requirements of wholesale electric power. Plaintiffs Niles, Michigan, and Bluffton, Indiana, which operate generating facilities, allege that they depend on the defendant for more than 90% of their requirements of electric power.

The plaintiffs further contend that the defendant dominates and controls the distribution and sale of retail electric power within its service area. They contend that the de-

fendant has increased its control of the retail market by acquiring municipal electric utilities. It is stated in their complaint that since 1957 the defendant has purchased the assets of four of the twenty (20) municipal utilities within its service area, has absorbed their retail distribution into the I & M system, and has taken over their retail industrial, commercial and residential customers, as follows: Kendall-ville, Indiana (1957), Decatur, Indiana (1959), Portland, Indiana (1963), and Albion, Indiana (1966). Because of this, the plaintiffs contend that the defendant company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated systems serve retail customers in fewer than 10%.

Plaintiffs allege that the defendant, I & M has monopolized and attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2, in the following ways:

- (1) Since January 13, 1973, the defendant has required municipalities to pay a new wholesale price for electric power. The new wholesale price is substantially higher than the retail price the defendant company charges its own industrial customers. This causes the municipalities to be unable to buy power at the defendant's wholesale price and sell it at competitive prices.
- (2) On March 8, 1974, after fourteen months of requiring the city of Fort Wayne to pay more for wholesale electric power than the defendant's own retail industrial cus-

#### Order and Memorandum of the District Court

tomers pay, and after more than twenty (20) years of selling retail electric power to its own customers in the Fort Wayne area for less than it sells retail power elsewhere, the defendant obtained the agreement of the city officials that the city of Fort Wayne will lease its entire electric utility system to the defendant for thirty-five (35) years. Under the lease agreement to be submitted to the voters, I & M will take possession of all the property and facilities of the city's electric utility and will operate the electric distribution system. The defendant will take over the city's retail customers and will sell electric power directly to them.

The plaintiffs further contend that the adoption of a wholesale price to municipalities in excess of the retail prices at which it sells electric power has caused and threatens to cause the following consequences:

- (1) It impairs the plaintiffs' ability to compete against the defendant.
- (2) In municipalities that have absorbed the difference between the defendant's higher wholesale price and lower retail price, the electric utility's loss of earning exerts pressure on the citizens and officials of the municipality to discontinue operating the utility and to offer to sell or lease it to the defendant.
- (3) In the municipalities that increase their own industrial retail prices to the level of the defendant's higher wholesale price, and above the level of the defendant's lower retail industrial prices, this situation threatens to cause the municipalities' industrial customers to exert pres-

sure on the municipalities to sell or lease its utility to the defendant so they can purchase electric power at the defendant's lower price.

It is the plaintiffs' contention that these alleged practices have been done with the intent, and have the effect, of monopolizing part of the trade and commerce among the several states in the distribution and sale of electric power at retail in violation of Section 2 of the Sherman Act and have injured the municipalities in their business and property. Plaintiffs thus seek declaratory and injunctive relief and treble damages.

The defendant, I & M, has responded to plaintiffs' complaint by filing a motion to dismiss or in the alternative to stay, pursuant to Rule 12 of the F.R.C.P. The defendant's motion to dismiss is based upon the following grounds: The Court lacks jurisdiction over the subject matter of the action and the plaintiffs' complaint fails to state a claim upon which relief may be granted.

In the motion to stay, defendant contends that in the event the Court does not dismiss this action, the Court should order this proceeding stayed until the conclusion of the regulatory proceedings before the Federal Power Commission involving defendant's rates charges to wholesale customers, including plaintiffs, to which proceedings defendant and the Indiana & Michigan Distributors Association (of which plaintiffs are members) are parties.

Subsequent to a hearing on defendant's motion to dismiss, or in the alternative to stay, and while defendant's motion was under advisement by the Court, the defendant filed a motion for leave to file supplementary affidavit and

#### Order and Memorandum of the District Court

exhibits in support of its motion to dismiss or in the alternative to stay. The Court finds from reviewing defendant's supplementary affidavit and exhibits that they are submitted in support of the proposition that the dual pricing structure of which plaintiffs complain does not exist and that plaintiffs are in fact paying less under the present wholesale rates than they would pay under the applicable retail tariff and, therefore, there is no basis upon which the plaintiffs can claim injury. The Court finds that the material which defendant seeks to file, by way of supplementary affidavit and exhibits, is not material in support of its motion to dismiss or in the alternative to stay but, in fact, is material in opposition to the substantive issue of plaintiffs complaint, which issue is presently not before this Court. The present motion before the Court and the motion defendant seeks to supplement, involves the jurisdiction of this Court and not the merits of plaintiffs' complaint. If and when the merits of plaintiffs' complaint are at issue, the defendant will be allowed to present its opposition to plaintiffs' claim and the Court will then consider such material. The Court finding defendant's supplementary material to be irrelevant to the present motion, it is the Order of the Court that defendant's motion for leave to file supplementary affidavit and exhibits be denied.

In considering defendant's motion to dismiss or in the alternative to stay, the Court has had to become familiar with some of the proceedings that have gone on and are going on in the Public Service Commissions of Indiana and Michigan ("Indiana Commission" and "Michigan Com-

mission", respectively), and the Federal Power Commission ("Commission") with respect to the approval of retail and wholesale rates submitted by I & M since 1971. The following is a summary of what has occurred in the respective Commissions:

#### RETAIL RATES

	arbinin aviiin
Dates	Action Taken
July 30, 1971	I & M filed petition requesting the Indiana Commission to make an investigation and hold public hearings in regard to I & M's proposed new rates.
March 24, 1972	Indiana Commission issued an order setting I & M's retail rates for the State of Indiana. The rates were effective March 29, 1972.
July 30, 1971	I & M filed a petition with the Michigan Commission asking them to investigate and hold hearings on the proposed rate increase for Michigan.
March 20, 1973	The Michigan Commission granted an increase in the rates. The rates were effective March, 1973.
	Wholesale Rates
June 13, 1972	Pursuant to 16 U.S.C. §824(d), I & M submitted proposed rate increases in the rates charged to wholesale customers to the Federal Power Commission.

#### Order and Memorandum of the District Court

Dates	Action Taken
August 11, 1972	Public hearings were ordered and the Indiana and Michigan Municipal Distributors Association (IMMDA) request to intervene in the proceed- ing was granted.
August 13, 1972	The Commission designated this date as the effective date for I & M's new rates and suspended the effective date of the new rates for five months thereafter, until January 13, 1973.
December 5, 1972	I & M appealed to the United States Court of Appeals in the District of Columbia Circuit, on the grounds that the effective rate date should be July 14, 1972. While it was sub judice, the Commission on January 31, 1974, commenced its hearings on the lawfulness of the proposed rates.
February 14, 1973	The Court of Appeals ruled favorably on I & M's petition, vacated the Commission's suspension order and remanded the proceeding to the Commission, with instructions that I & M's rates be made effective retroactive to July 14, 1972. A petition for rehearing was filed.

#### Dates

#### Action Taken

#### August 14, 1974

The rehearing was granted and the Court modified its order as follows: I & M may not collect retroactive rate increases for the five-month period from the effective date of its rate filing, July 14, 1972, through December 13, 1972; I & M may collect the difference between its old and new rates for the period from December 14, 1972, through January 13, 1973. If the Commission determines that I & M's filed rates are unjust or unreasonable, it may order I & M to refund the amounts collected after December 13, 1972, in excess of the just and reasonable rates. Indiana & Michigan Electric Company v. Federal Power Commission, No. 72-2168 (D.C.Cir. 1974).

#### April 16, 1974

The hearings on the lawfulness of I & M's rates were concluded and a briefing schedule established, final briefs being due on September 3, 1974. It is expected that the final decision of the Administrative Law Judge will be appealed.

#### I-Subject Matter Jurisdiction

Defendant I & M contends that its retail rates which have been set by the Indiana Commission and the Michigan Commission are immune from attack under the Sherman

#### Order and Memorandum of the District Court

Act. It argues that it is a well settled principle of antitrust law that conduct which violates the Sherman Act, if undertaken by a private individual, is immune from attack under the Sherman Act if undertaken by the state or its agents acting in the scope of their authority, Parker v. Brown, 317 U.S. 341 (1943). I & M alleges that nothing in the Sherman Act is intended to restrain a state or its officers or agents from activities directed by its legislature. It is defendant's position that congress has pre-empted the authority over wholesale rates of electric utilities but has left the states sovereign with respect to the rates and regulations concerning retail sales within the states' borders. Therefore, the retail rates in Indiana and Michigan are subject exclusively to regulation by the Indiana and Michigan Commissions. Defendant states that because I & M's retail rates derive their authority and efficacy from the legislative commands of Indiana and Michigan and cannot operate or be effective without that command, they are immune from attack under the Sherman Act.

It is also the defendant's position that the Court cannot issue an order affecting the wholesale rates since they are within the exclusive or, alternatively, the primary jurisdiction of the Commission. Defendant contends that should the present proceedings not be terminated, they will result in an order determining the just and reasonable rates for I & M's wholesale customers, including the plaintiffs herein, and these wholesale rates will be subject to the Commission's approval as just and reasonable. I & M assert that the rates which plaintiffs attack are clearly within the Commission's regulatory domain. The defendant also acknowledges that anti-competitive conduct may be raised and con-

sidered by the Commission in its rate determination, but it may only deal with allegations of anti-competitive conduct that are specifically articulated and that are within its jurisdiction to remedy. I & M further agrees that the Commission has no power over the retail rates which are left to the regulatory power of the State Commissions. Because the Commission has no power over the retail rates, I & M is aware of the Commission's inability to remedy a claim of anti-competitive behavior, premised on the difference in rates charged by I & M to its wholesale and retail customers, by raising the retail rates to the level of the wholesale rates. The Commission also finds that its jurisdiction over wholesale rates is clear and that it cannot be limited by the state's action with respect to retail rates. It is the defendant's contention that the Commission cannot set wholesale rates at a level equal to or lower than the retail rates if the lower rate would not be adequate to cover the utilities' allocated cost-of-service or would result in an inadequate rate of return. To do so would result in an abdication of the Commission's statutory responsibility to set only just and reasonable rates.

The defendant sees the problem as one of inter-relationship of two separate statutory schemes. The Sherman Act has as its goal the determination of prices and services by the working of a free market. The Federal Power Act substitutes for competition the authority of a regulatory agency to supervise the rates and prices charged by electric companies on the grounds that the concept of prices set by free market competition has no place in industries which are monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing

#### Order and Memorandum of the District Court

business. Thus the defendant contends that the antitrust laws may only be applied to the extent that the matter in question is not within the reach of the regulatory agency's supervision.

The plaintiffs in response to defendant's argument contend that the Court does have jurisdiction of the subject matter of this case. It is plantiffs' position that the use of monopoly power to prevent competition is a violation of the anti-trust laws over which this Court has jurisdiction. They rely on Section 2 of the Sherman Act, 15 U.S.C. §2. They further assert that Sections 4 and 16 of the Clayton Act, 15 U.S.C. §\$15 and 26, provide a right of action and remedies to private parties who are injured by violation of the Sherman Act.

The plaintiffs contend that the defendant's motion ignores the fact that this anti-trust action does not challenge the defendant's wholesale or retail prices, but challenges the defendant's act of allegedly monopolizing and attempting to monopolize the business of selling electric power at retail. Plaintiffs contend it does so by abusing its discretion to file wholesale and retail prices and by instituting a dual price structure that prevents competition and extends the monopoly control.

It is the plaintiffs' position that this Court will not be required either to issue an order raising the retail rates, or issue an order lowering the wholesale rates. Plaintiffs assert that the power to establish prices rests with the defendant utility, subject only to the requirement that it be within a zone of reasonableness and that they undergo agency review. It is the plaintiffs' position that the defendant it-

self has the power to eliminate the dual price system by changing its own price-setting practices and by making such new filings before one or more of the state or federal regulatory agencies as the defendant sees fit which will remove the allegedly unlawful disparity between the price at which the defendant sells electric power to its customers and the price the defendant requires its competitors to pay.

Plaintiffs claim that the Federal Power Act does not immunize the defendant's alleged monoply from coverage of the anti-trust laws, and that the defendant itself concedes in its brief on Page 25 that the anti-trust laws may be applied "to the extent that the matter in question is not within the reach of the regulatory agency's supervision." It is argued by the plaintiffs that the Federal Power Act, as interpreted by the Commission, does not itself provide a pervasive regulatory scheme to control the defendant's practice of instituting a dual price system and requiring its competitors to pay more for electric power than its retail customers. Plaintiffs state that the Commission has held that dual price systems and their anti-competitive effects are beyond the Commission's jurisdiction. Thus, the Federal Power Act fails to replace the anti-trust laws with provisions that would regulate the defendant's monopolization or immunize the defendant from the coverage of the anti-trust laws.

After reviewing both parties' arguments as to whether the Court lacks jurisdiction over the subject matter of this action, the Court finds that it does have jurisdiction over the case before it. The defendant has attempted to send the Court down two paths of exclusive jurisdiction and then inform it that because the Court has no control over the Order and Memorandum of the District Court

exclusive areas, it has no jurisdiction over the present action. I & M first argues that the retail rates in dispute are the products of approval by the Indiana and Michigan Public Service Commissions and, as such, are protected from the Sherman Act under the reasoning set out in Parker v. Brown, supra. Next, I & M points out how the Federal Power Act, 16 U.S.C. §824(d)(a) 1970 has granted the Commission the power to decide if the rates and charges made, demanded, or received by a public utility for or in connection with the sale at wholesale of electric energy are just and reasonable and therefore lawful. The Court agrees with the defendant and the principles set forth in Parker v. Brown. The Court in this case does not have any authority under the Sherman Act to attack the Indiana and Michigan Public Service Commissions' findings that the retail rates implemented by I & M were lawful. The respective state commissions are empowered to determine whether the electric retailers' rates are just and reasonable in relation to cost and rate of return, and the Court in no way intends to intrude upon that particular decision. Further, the Court recognizes that Congress has pre-empted the authority over wholesale rates. There is no dispute but that the Federal Power Commission has been given the task of reviewing the lawfulness of the wholesale rates charged by the defendant company. However, the plaintiffs themselves are not attacking the action of the state commissions, nor the role of the Federal Power Commission. What is really at issue in this case is the action of the defendant, I & M.

I & M deals in both wholesale and retail electric power and, therefore, has to initiate rates which are subject to the scrutiny of the state commissions on one level and the Federal Commission when wholesale rates are put into effect. The Commissions operate independently of one

another and in no way rely on the other's actions when deciding upon the lawfulness of the respective rates. The defendant in this case is also the plaintiffs' only outside source of wholesale electric power, which position makes the Federal Power Commission the only control over the defendant's price for wholesale power since competition with other wholesalers does not exist in the area.

A great portion of the defendant's argument focused on a regulatory agency's exclusive or primary jurisdiction over the rates charged by the defendant. I & M cites the cases of Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973), and Pennsylvania Power Company v. F.P.C., 193 F.2d 230 (D.C.Cir. 1951), aff'd., 343 U.S. 414 (1952), to support the position that anti-trust laws have no application upon an issue which has been placed under the control of a regulatory agency. Here the defendant contends that Congress has given the power over wholesale rates to the Commission and that anti-trust criteria are not to be the governing factor. In both Ricci and Pennsylvania Power Company the Court was concerned with conduct covered by the respective regulatory statutes. In Ricci the issue before the Court involved whether the defendant had violated the rules of the Chicago Mercantile Exchange, an issue the Supreme Court decided was within the jurisdiction of the Commodities Exchange Commission. In Pennsylvania Power Company the Court would not allow anti-trust criteria to be forced upon the Commission in its decision of what rate was just and reasonable.

The case before us is distinct from both Ricci and Pennsylvania Power Company. Here, the alleged monopolistic practice not only involves rates which are subject to review by the Federal Power Commission but also separate rates

#### Order and Memorandum of the District Court

reviewed by state commissions. Further, it is not the decision by the commission, nor the criteria used in the commission's decision, that is under attack by the plaintiffs. Instead, what is sought to be enjoined is beyond the reach of both state and federal commissions and within the power of the defendant; that is, the initiation of a dual rate structure whereby plaintiffs are allegedly being forced out of the retail electric business by the defendant.

The Federal Power Commission itself has indicated that the alleged dual price system and its anti-competitive effects are beyond the Commission's jurisdiction (Order Denying Motion to Reject, Granting Petition to Intervene in Part and Amending Prior Order, Indiana and Michigan Electric Co., FPC Docket No. 7740, November 27, 1973 [Appendix A] Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss or Stay).

The dilemma caused by the seemingly contrary purposes of the regulatory agencies and the anti-trust laws is not a new issue in anti-trust litigation. Although they are different forms of control, they have the same goal and that goal is to serve the public interest. In the Supreme Court case of Georgia v. Pennsylvania R.R., 324 U.S. 439 (1944), the State of Georgia, as plaintiff, filed suit against twenty railroad companies alleging that the companies conspired to fix their rates in such a manner as to prefer the ports of other states over the ports of Georgia in violation of the anti-trust laws. The Court in Georgia stated that "[r]egulated industries are not per se exempt from the Sherman Act."

The Court in the Georgia case also cited Justice Brandeis' words in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922) wherein he stated as follows:

All the rates fixed were reasonable and nondiscriminatory. That was settled by the proceeding before the Commission . . . . But under the Antitrust Act, a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal; and if so, the Government may have redress.

#### The Court further stated:

The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government... The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate making.... The Act was designed to preserve private initiative in rate-making as indicated by the duty of each common carrier to initiate its own rates.

Although the Georgia case involved the Interstate Commerce Commission and not the Federal Power Commission, it has many similarities with the present case. Here, as in Georgia, the rates are not within the discretion of the Court. It is also a fact that in the present case, the Federal Power Commission has no power over the alleged anti-trust violation that is asserted here because it involves retail rates over which it has no control. 16 U.S.C. §824.

Because the alleged dual structure is outside the jurisdiction of both the federal and state commissions, there is actually no conflict between the anti-trust laws and the regulatory agency. Georgia, supra. The defendant has attempted to present the plaintiffs' claim as one attacking the rates themselves and not one attacking their effect.

The Court in Otter Tail Power Co. v. United States, 410 U.S. 366 (1972), faced a similar defense and stated as follows:

Order and Memorandum of the District Court

The anti-trust charge against Otter Tail does not involve the lawfulness of its retail outlets, but only its methods of preventing the towns served from establishing their own municipal systems when Otter Tail's francise expired.

The Supreme Court in Ottter Tail further stated the following with respect to the Federal Power Act, 16 U.S.C. §824:

There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

Just as the Court in Otter Tail was hesitant to conclude that the authority of the Federal Power Commission to order inter-connections was intended to "be a substitute for, or to immunize Otter Tail from, anti-trust regulation for refusing to deal with municipal corporations", this Court cannot conclude that the Federal Power Commission's authority to review rates was an intended substitute for the anti-trust laws in a situation involving the alleged monopolizing effect of a dual price structure.

Because regulated industries are not immune from antitrust laws and because the present case concerns an issue over which the regulatory agency has no jurisdiction, the Court finds that it has jurisdiction over the subject matter of this action, and the defendant's motion to dismiss for lack of jurisdiction is denied.

#### II—Failure to State a Claim

The defendant also argues that the plaintiffs' complaint should be dismissed for failure to state a claim upon which relief may be granted because their claim is premature and because if defendant's wholesale rates have been too high, plaintiffs will not be injured because of a possible refund. I & M contends that plaintiffs' claim assumes the existence of two established rates, one for I & M's retail industrial customers and one for the plaintiff municipalities, and that, in fact, there is only one established rate, that being the retail rate. It cites the United States Court of Appeals for the District of Columbia Circuit on rehearing in Indiana & Michigan Electric Co. v. FPC, Docket No. 72-2168 (D.C. Cir. Aug. 14, 1972), in which the Court altered the effective date of I & M's proposed wholesale rates for electric power and permitted the rates to become effective subject to refund based upon the Commission's decision. It is the defendant's position that although I & M may collect the difference between its old and new rates from December 14, 1972, the rate has not yet been approved by the Commission and thus is subject to being reduced by the Commission.

The facts of this case show that the state commissions have established retail rates and that there is presently pending before the Federal Power Commission the issue of the lawfulness of I & M's wholesale rates. The Court notes that although the question of the rates' lawfulness has not been resolved by the Commission, the rates themselves are in effect and have been for collection purposes since December 14, 1972. It is true that if the Commission finds the rates to be unlawful, the defendant will have to

#### Order and Memorandum of the District Court

refund that portion of the rate found to be excessive. On the other hand, if the rates are just in relation to cost and fair rate of return, they will no doubt be upheld by the Commission. In either situation, we are discussing a future result which is in no way based on any of the anti-trust considerations set forth in plaintiffs' complaint.

The Court finds that there are presently in effect two rates: one an established rate for retail electric power, and one a rate for wholesale power, the latter being subject to change by the Commission although it is presently being collected. It would be notably different in this case if the practice of the Commission was to not allow a rate increase to go into effect until after approval by the Commission. For if that were the situation, the plaintiffs would be complaining about a future harm that might never come to pass. Whether the rate presently being charged by the defendant as wholesaler will be upheld by the Commission is not the ultimate concern of the plaintiffs in this case. The real concern here is the defendant's present and future ability to set up a dual price structure by going through two reviewing commissions which have no control over the dual structure.

The fact that the defendant has legally set both its wholesale and retail prices is no ground to immunize it from the anti-trust laws. Georgia, supra. The Court finds that although the present wholesale rate is subject to change by the Commission, the Commission has no power over the alleged dual rate structure which is allegedly in effect at this time. Thus, it has no jurisdiction over the issue in this suit. The plaintiffs are not attacking the actual rates charged by the defendant and, therefore, whether the

Commission finds the rate fair is irrelevant to the substantive issue before the Court. The defendant has the right to initiate a given rate, and the Commission has the authority to make sure the rate is fair in relation to cost and rate of return. The initiation of new rate schedules is a continuing process carried on by the defendant. It is also the point over which this Court has the power to provide relief if the plaintiffs can prove their allegation. Because the Court is in reality focusing on the dual price structure and not the actual prices charged for either retail or wholesale, the results of the Commission's decision would only affect whether defendant would have to initiate new rates if the plaintiffs can prove that defendant is violating the Sherman Act, §2. That is, if the Commission finds the defendant's rates to be just, the Court would be forced to order defendant to initiate a new rate structure which eliminated the dual price system of higher wholesale prices. However, if the Commission finds the present rate to be unjust, then the Court would only enjoin the defendant from any future dual system.

The defendant also contends that if the Commission declares the present wholesale rates to be unlawful, the defendant will have to refund the excessive amount and, therefore, there will have been no damage. Whether the plaintiffs are entitled to damages, although not clear at this point, is no reason to deny the Court jurisdiction over this action which seeks injunctive, declaratory and damage relief. If, in fact, the plaintiffs can recover damages in this action, the amount of those damages will have to be proved by the plaintiffs at trial. It is, therefore, the Order of the Court that defendant's motion to dismiss for failure to state a claim be denied.

#### Order and Memorandum of the District Court

#### III—Stay the Proceeding

The defendant also asks that if the Court does find that it has jurisdiction over the present action, the action be stayed until a final decision is handed down by the Commission. As stated above, the Commission's decision on the lawfulness of the defendant's wholesale rate is not determinative of the issue before this Court. The issue of the lawfulness of the defendant's rate is in the exclusive jurisdiction of the Commission and is not for this Court to decide. If that were the issue before the Court, the case would have to be dismissed.

Staying the present action will not aid this Court in deciding the matter before it as it did the Court in Ricci. In this action the alleged wrong is occurring at this time, and although there is a possibility that agency action may change the situation, the same possibility exists that no change will take place. The agency acts as a review agency after the rate is initiated by the utility company. Since it is the initiation of a monopolistic structure that the Court is asked to prohibit and not the rate itself, final action by the agency will not by itself prohibit the problem although it may alleviate it for a time. Furthermore, if the Court found that damages were recoverable in this case and that in determining the damages the final decision of the Commission was necessary and the Commission has not yet ruleu on the lawfulness of the wholesale rate the present action could at that time be stayed by the Court for the purpose of awaiting the Commission result.

It is, therefore, the Order of the Court that defendant's motion to stay be denied.

#### Order of the District Court, October 22, 1976

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

Case No. S74-72
Date 10/22/76
Time—From: 1:30
To: 2:30
Deputy R. Timmons
Reporter—Gail
Judge—Allen Sharp

CITY OF MISHAWAKA, INDIANA et al.

vs.

INDIANA & MICHIGAN ELECTRIC COMPANY

Plaintiff(s) Represented By Thomas R. Ewald and R. Wyatt Mick Jr.

Defendant(s) Represented By Peter J. Schlesinger and Lawrence Levy

#### Proceedings:

Hearing had on pending motions. Court hears argument of counsel. Defendant, Indiana & Michigan Electric Company's motion to recosider, vacate, set aside and amend this Court's Order of May 1, 1975, is overruled. On verbal motion of counsel, Defendant is granted leave to file an appeal from this Order, pursuant to Title 28 USC, Section 1292(b). Court reserves its ruling on Pltfs.' motions to dismiss Deft's. counterclaims and to strike parts of Deft's. answer. Deft. is given to November 8, 1976, within which to answer the amendment to the Complaint. Sear, J.

#### Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

Civil Action No. S 74-72

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
and
TOWN OF AVILLA, INDIANA,
municipal corporations,

Plaintiffs,

v.

Indiana & Michigan Electric Company, a corporation,

Defendant.

#### COMPLAINT

Plaintiffs allege as follows:

#### I.

#### Jurisdiction and Venue

- 1. This is an action by ten municipalities that operate their own electric distribution systems against the electric power company that controls their supply of wholesale electric power and also competes against them for retail sales. The plaintiffs request relief against the defendant's monopolization of and attempt to monopolize the distribution and sale of electric power at retail within the area in which it does business, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2. The plaintiffs seek declaratory and injunctive relief and treble damages.
- 2. This Court has jurisdiction of this case by virtue of Sections 4 and 16 of the Clayton Act, 5 U.S.C. §§ 15, 26. The defendant company transacts business within the South Bend Division of the Northern District of Indiana.

#### II.

#### Parties

3. Plaintiffs, City of Mishawaka, Indiana; City of Niles, Michigan; City of Columbia City, Indiana; City of Bluffton, Indiana; City of Garrett, Indiana; City of Gas City, Indiana; Town of Frankton, Indiana; Town of Warren, Indiana; Town of New Carlisle, Indiana; and Town of Avilla, Indiana, are municipal corporations located within the service area of the defendant Indiana & Michigan Electric

#### Complaint

Company. Each of the plaintiffs operates its own electric utility, through which it purchases wholesale electric power from the defendant Indiana & Michigan Electric Company and sells and distributes the electric power at retail to industrial, commercial, and residential customers within its corporate limits and in nearby areas.

4. Defendant Indiana & Michigan Electric Company (sometimes referred to herein as "I&M" or "the company") is incorporated under the laws of the State of Indiana and is doing business in the plaintiff municipalities and elsewhere in the States of Indiana and Michigan. The defendant I&M is a vertically integrated electric power company, which generates electric power, transmits the power throughout its service area, and delivers the power both to its wholesale customers, including the plaintiffs, and directly to its own retail customers.

#### Ш.

#### Nature of Trade and Commerce

5. The defendant company is the only firm within its service area engaged in the business of transmitting and selling electric power at wholesale. The defendant company is the plaintiffs' only outside source of supply for wholesale electric power. Plaintiffs Mishawaka, Indiana; Columbia City, Indiana; Garrett, Indiana; Gas City, Indiana; Frankton, Indiana; Warren, Indiana; New Carlisle, Indiana; and Avilla, Indiana, depend on the defendant for all of their requirements of wholesale electric power for distribution and sale to their retail customers. Plaintiffs Niles, Michigan, and Bluffton. Indiana, which operate generating facilities, nevertheless depend on the defendant for

#### Complaint

more than 90% of their requirements of electric power for distribution and sale to their retail customers.

6. The defendant I&M also dominates and controls the distribution and sale of retail electric power within its service area. The defendant company has increased its control of the retail market by acquiring municipal electric utilities. Since 1957, the defendant has purchased the assets of four of the 20 municipal utilities within its service area, has absorbed their retail distribution facilities into the I&M system, and has taken over their retail industrial, commercial, and residential customers, as follows: Kendallville, Indiana (1957), Decatur, Indiana (1959), Portland, Indiana (1963), and Albion, Indiana (1966). In 1964, the defendant attempted to acquire the municipal electric utility of the City of South Haven, Michigan, but the sale was rejected by the voters of the City in three successive elections. The defendant company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated electric systems serve retail customers in fewer than 10%.

#### IV.

#### Violations of Law

- 7. The defendant I&M has monopolized and has attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, as follows:
- (a) Since January 13, 1973, the defendant I&M has required municipalities, including the plaintiffs, to pay a

#### Complaint

new wholesale price for electric power. In contrast to its previous practice, the defendant company's new wholesale price to municipalities is substantially higher than the retail price the defendant company charges its own industrial customers. As a result, the municipalities have become financially unable to buy power at the defendant's new wholesale price and sell it to their own industrial customers at prices that are competitive with the defendant's present retail prices;

- (b) On March 8, 1974, after fourteen months of requiring the City of Fort Wayne, Indiana, to pay more for wholesale electric power than the defendant I&M's own retail industrial customers pay and after more than twenty years of selling retail electric power to its own customers in the Fort Wayne area for less than it sells retail power elsewhere, the defendant I&M obtained the agreement of City officials that the City of Fort Wayne will lease its entire electric utility system to the defendant I&M for thirty-five years. Under the lease agreement to be submitted to the voters the defendant I&M will take possession of all of the property and facilities of the City's electric utility and will operate the electric distribution system. The defendant company will take over the City's retail customers and will sell electric power to them directly. Fort Wayne is the largest City within the defendant company's service area which still operates its own electric utility.
- 8. The defendant company's adoption of a wholesale price to municipalities in excess of the retail prices at which it sells electric power to its own industrial customers has caused and threatens to cause the following consequences:

#### Complaint

- (a) The defendant company has impaired the plaintiffs' ability to compete against the defendant for retail industrial customers;
- (b) In those municipalities that have absorbed the difference between the defendant's higher wholesale price and the defendant's lower retail industrial prices, the electric utility's loss of earnings exerts pressure on the citizens and officials of the municipality to discontinue operating the utility and to offer to sell or lease it to the defendant;
- (c) In those municipalities that increase their own industrial retail prices to the level of the defendant's higher wholesale price, which they must pay for electric power, and above the level of the defendant's lower retail industrial prices, the disparity between the municipalities' higher retail industrial prices and the defendant I&M's lower retail industrial prices threatens to cause the municipalities' industrial customers to exert pressure on the municipalities' industrial customers to exert pressure on the municipality to sell or lease its utility to the defendant I&M so they can purchase electric power at the defendant's lower prices.
- 9. The acts and practices of the defendant I&M alleged herein have been done with the intent, and have had the effect, of monopolizing part of the trade and commerce among the several states in the distribution and sale of electric power at retail and have injured the plaintiff municipalities in their business and property in an amount exceeding \$1,000,000 before trebling. The plaintiffs' losses are continuing.

#### Complaint

 Unless the relief requested by this Complaint is granted, the defendant company will continue to violate 15 U.S.C. §2.

#### V.

#### Relief

Wherefore, plaintiffs pray as follows:

- For a declaratory judgment that the defendant company has violated 15 U.S.C. §2 by monopolizing and attempting to monopolize the distribution and sale of electric power at retail within its service area.
- For an order enjoining the defendant company, its officers, agents, employees, successors, and all persons in active concert or participation with them, from violating 15 U.S.C. §2.
- 3. For an order enjoining the defendant I&M from maintaining a disparity between the prices at which it sells electric power and under which it requires the plaintiff municipalities to pay a higher wholesale price than the retail prices at which it sells and distributes power to its own industrial customers.
- 4. For an order awarding the plaintiffs treble the amount of damages they have sustained as a result of the defendant's violations of 15 U.S.C. §2.
- For an order awarding the plaintiffs reasonable attorney's fees, together with the costs and disbursements of this action.

#### Complaint

For such other and additional relief as the interests of justice may require.

Michael Nussbaum Ronald G. Precup Surrey, Karasik & Morse 1156 15th Street, N.W. Washington, D. C. 20005 (202) 331-4000

Of Counsel

8/ THOMAS R. EWALD

Thomas R. Ewald 1156 15th Street, N.W. Washington, D. C. 20005 (202) 872-8686

8/ R. WYATT MICK, JR.

R. Wyatt Mick, Jr.
Bingham, Loughlin, Means,
Mick & Myers
400 Lincoln Way East
Mishawaka, Indiana 46544
(219) 255-9616

8/ JAMES J. OLSON

James J. Olson 122 South Mill Street Mishawaka, Indiana 46544 (219) 259-5461 Attorneys for Plaintiffs

#### Amendment to the Complaint

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil Action No. S 74-72

CITY OF MISHAWAKA, INDIANA, et al.,

Plaintiffs,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY,

Defendant,

#### AMENDMENT TO THE COMPLAINT

The plantiffs allege as follows:

7. (c) Since July 27, 1976, the defendant I & M has required municipalities, including the plaintiffs, to pay a new, higher wholesale price for electric power. As a result, the municipalities have become financially unable to buy power at the defendant's new wholesale price and sell it to indus-

#### Amendment to the Complaint

trial customers at prices competitive with the defendant's present retail prices.

8/

Thomas R. Ewald 1156—15th Street, N. W. Washington, D. C. 20005 (212) 331-4053

R. Wyatt Mick, Jr.
Bingham, Loughlin, Means,
Mick & Myers
400 Lincoln Way East
Mishawaka, Indiana 46544
(219) 259-9616

James J. Olson 122 South Mill Street Mishawaka, Indiana 46544 (219) 259-5461

Attorneys for Plaintiffs

MAY 10 1978

IN THE

# Supreme Court of the United States RODAK, JR., CLERK

October Term, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
TOWN OF AVILLA, INDIANA,
municipal corporations,

Respondents.

#### PETITIONER'S SUPPLEMENTAL BRIEF

WHITNEY NORTH SEYMOUR

Counsel for Petitioner

One Battery Park Plaza

New York, New York 10004

(212) 483-9000

Of Counsel:

RICHARD M. DICKE
PETER J. SCHLESINGER
DENNIS G. JACOBS
SIMPSON THACHER & BARTLETT

THOMAS W. YODER
LAWRENCE A. LEVY
LIVINGSTON, DILDINE, HAYNIE & YODER

May 10, 1978

## TABLE OF CONTENTS

-de	PAGE
Discussion	2
Conclusion	8
Appendix	A1
TABLE OF CASES	
Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976)	
Gordon v. New York Stock Exchange, 422 U.S. 659 (1975)	
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	
Parker v. Brown, 317 U.S. 341 (1943)	6r
United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975)	

# Supreme Court of the United States

October Term, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
and
TOWN OF AVILLA, INDIANA,
municipal corporations,

Respondents.

#### PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner Indiana & Michigan Electric Company, pursuant to Rule 24(5) of this Court, files this Supplemental Brief in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and in response to the Brief for the United States as Amicus Curiae.

#### Discussion

On January 16, 1978 the Court invited the Solicitor General to submit the views of the United States in connection with the underlying Petition for a Writ of Certiorari. On May 2, 1978, the Solicitor General filed a Brief which presents irreconcilable positions on behalf of the Department of Justice and the Federal Energy Regulatory Commission ("Commission"). In light of the views expressed, we respectfully submit that the proper disposition should be the granting of the writ, rather than its denial as suggested in the Government's Brief. This would seem to be the appropriate way to provide the clarification necessary to avoid the confusions and conflicts between the Commission and the many lower courts involved, which will inevitably flow from the positions of the Government agencies reflected in the United States' Brief.

While there is not yet a conflict between the circuits on the issues presented by the Petition, the basic conflict revealed between the Department of Justice, which is empowered to enforce the provisions of the Sherman Act, and the Commission, to which Congress has entrusted the task of eliminating discrimination in rates for electric service, including the type of discrimination that was the subject of this Court's decision in Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976), is equally, if not more, serious and in need of prompt supervisory action by this Court. If there is to be any semblance of uniformity or orderly procedure in the disposition of price squeeze claims in this regulated industry, it can be achieved only if this Court now reviews the questions presented, before the dis-

trict courts and the several circuits are catapulted into the midst of this difference of opinion within the Government.

The chasm between the views of the Department of Justice and those of the Commission reflects, we suggest, recognition on the part of the Commission that the basic position asserted by Petitioner correctly reflects the Congressional purpose. Since the Commission maintains that its determination as to the reasonableness of wholesale rates, as well as its determination with respect to competitive impact and antitrust legality would "be binding on the antitrust court" (Solicitor General's Br. at 19, 22), it naturally follows that there would be a wasteful expenditure of the time of many district courts in performing the ministerial role of supervising pre-trial discovery while awaiting the views of the Commission on all substantive issues.

A resolution of the issues now will settle the jurisdictional question and will give guidance as to how the strained resources of the Federal district courts should be allocated. Indeed, if the district courts lack jurisdiction, or even if, as the Commission claims, the courts are bound by the Commission's findings, it would appear unnecessary and burdensome to require the district courts to embark upon and supervise the exhaustive discovery associated with complex antitrust litigation. Both the precious time of the courts, already overburdened, and the energies of a utility company's personnel, needed in solving critical energy problems, would be conserved by definitive disposition of the basic questions now.

On the other hand, to deny certiorari would result in the atomization of the price squeeze claims into separate legal and fact issues which might well be tossed back and forth between the Commission and the district court for independent resolution. On review, these separate legal and fact issues would be distributed for separate appellate resolution among circuit courts of appeal, without any assurance that, on such separate review, the potential disparities in results reached can be eliminated. The conflicts within the Government foreshadow conflicts which must eventually be resolved here. No reason for delay outweighs the public advantages of early resolution.

Moreover, in view of the primacy which the Commission attaches to its resolution of price squeeze issues and the Commission's view that its findings on such issues are "binding" upon the antitrust court, it seems clear, despite the disclaimer in the Solicitor General's Brief, that the Commission in fact endorses and supports our position that it has at least primary jurisdiction over price squeeze issues.<sup>2</sup> Indeed, the United States concedes that the "prac-

tical effect" of the Commission's position is to allow the Commission to "confer antitrust immunity" upon the acts alleged in the complaint (Solicitor General's Br. at 22). This stands as an additional reason supporting the grant of the Petition.

There is nothing in the Solicitor General's Brief which harmonizes the decisions of this Court in Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) and United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975) with the contrary result reached by the Court below, other than an attempt to distinguish those cases on the ground that they "involved completely different statutory schemes" (Solicitor General's Br. at 13). The irreconcilable conflict which was found by this Court in Gordon and in NASD to work an implied repeal of the Sherman Act in cases arising under the Securities Exchange Act and the Investment Company Act, seems to

sale rate. Accordingly, there would be no need for the antitrust court to refer this case to the agency to make that determination. The question, rather, is whether the district court should defer proceeding with the antitrust case to enable the Commission to exercise its primary jurisdiction over certain issues."

Four pages later (at 19), the Solicitor General provides this Court with the views of the Commission:

"\* \* In sum, before the respondents can prevail on their antitrust complaint, the Commission must determine the ultimate issue of the reasonableness of the wholesale rates in relation to the retail rates."

These statements seem to amount to recognition that a district court is required to refer this case to the Commission for its resolution of all of the ultimate facts. Based upon this recognition, it would be illogical and a waste of judicial assets to allow the district court to proceed before the Commission completes its functions. It is for this reason, and because of the recognition above quoted, that we have not further responded to the arguments raised by the Solicitor General on the issue of primary jurisdiction. In that regard, we rest on the arguments presented to the Court in our original Petition (Point IV, at 24-28).

<sup>1.</sup> The need for early resolution of the jurisdictional issues raised by the Petition is further pointed up by an analysis of the Solicitor General's Brief. We have set forth in Appendix "A" hereto excerpts from that Brief which reflect the antagonistic views of the United States and the Commission and internal inconsistencies in the position of each. Some of those conflicting views would deprive the antitrust court of any functions other than to supervise discovery, to resolve threshold issues, and to dispatch numerous references to the Commission. The analysis contained in Appendix "A" strongly suggests that this Petition should be granted if this Court's decision in Commany is to be given what we believe is the scope and effect intended for it by this Court.

At page 15 of his Brief, the Solicitor General sets forth as the unified view of the United States the following:

<sup>&</sup>quot;In the present case, the Commission already is conducting a proceeding to determine the lawfulness under the Federal Power Act of the price squeeze allegedly resulting from the 1976 whole-

<sup>(</sup>footnote continued on next page)

us to be no different from the conflict which the Petition points out as existing between the Sherman Act and the Federal Power Act, as the latter was interpreted by this Court in Conway.

The reliance of the Solicitor General on the decision in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) is, in our view, misplaced, as it was in the Briefs filed by Respondents and by the amicus curiae who oppose the grant of the Petition. The quotations from Otter Tail appearing in the Brief are all taken from Part I of the Court's opinion dealing with the issue of Otter Tail's refusal to deal—i.e., the refusal to wheel electric power. This Court's decision in Otter Tail on the wheeling issue turned on the legislative history of the Federal Power Act from which this Court found that the Federal Power Commission had no jurisdiction over the wheeling of electric energy, since the "common carrier" provisions, originally proposed, had been eliminated from the Act.

We submit that the Government's Brief serves to emphasize the importance of review by this Court now to provide the lower courts and the Commission with necessary guidance. If the decision below stands and the conflict within the Government leads the courts and commissions on a collision course into what can only be a series of pro-

cedural conflicts, the results will be extremely destructive of a sound administration of the Sherman Act and the Federal Power Act.

The Petition sets forth (at 10-12) the price squeeze cases of which we were then aware and which were then pending before the Commission and before the district courts. They have continued to proliferate. To permit those cases to proceed in the district courts in the face of the Commission's now publicly announced position that its findings are binding on the antitrust court invites confusion compounded.

The circumstances of Petitioner's own situation clearly highlight the difficulties which will ensue if the issues raised by the Petition are not promptly resolved by this Court. The Presiding Administrative Law Judge assigned by the Commission to hear the allegations of price squeeze in connection with Petitioner's 1976 wholesale rate filing has now set October 4, 1978 for the hearing on the price squeeze issues; the district court judge presiding over Respondents' price squeeze antitrust cases issued an order on April 10, 1978 which consolidated those cases for trial, commencing November 14, 1978. If, as the Commission believes, the district court is bound by the Commission's ultimate findings on the price squeeze allegations raised by Respondents, the potential conflict to which we have alluded in our Petition and Reply Brief is elevated to the status of a clear and present danger.

<sup>3.</sup> The actions of state commissions are necessarily involved in claims of alleged price squeeze. This is recognized in the Government's Brief (fn. 5 at 14), as it must be, as "state action" under Parker v. Brown, 317 U.S. 341 (1943). While not specifically ennumerated in the "Questions Presented," the principle of "state action" was referred to by Petitioner (Petition, Point III at 20-23), was discussed extensively by the court below (Petition at 16a-17a) and is inherent in the entire problem, especially in light of the Government's Brief.

#### Conclusion

The Brief of the Government as Amicus Curiae, while opposing, actually furnishes additional reasons for granting the Petition. Indiana & Michigan Electric Company submits that its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

#### Respectfully submitted,

WHITNEY NORTH SEYMOUR

Counsel for Petitioner

One Battery Park Plaza

New York, New York 10004

(212) 483-9000

Of Counsel:

RICHARD M. DICKE
PETER J. SCHLESINGER
DENNIS G. JACOBS
SIMPSON THACHER & BARTLETT

THOMAS W. YODER
LAWRENCE A. LEVY
LIVINGSTON, DILDINE, HAYNIE & YODER

May 10, 1978

#### APPENDIX A

#### Appendix

The views of the Department of Justice and of the Commission as to the respective powers of the Commission and the antitrust court, as presented in the Government's Brief as *Amicus Curiae*, are set forth below on a comparative basis that reflects the incompatibility between them as well as the internal inconsistencies of each.

#### 1. Determining the Reasonableness of Past Rates:

The Commission at 21 fn.10:

"[It is] appropriate for the antitrust court to refer to the Commission issues involving the reasonableness of past rates. Although the Commission has no authority to provide retroactive remedies [citation omitted], the need for uniformity in the standards governing just and reasonable rates and the assistance which the Commission's expertise can bring to bear on the technical issues involved suggest that those issues also be referred to the Commission for its determination." (Emphasis added.)

The United States at 22 fn.11:

"[T]he United States perceives no policy reason which supports making the Commission's determination of the competitive impact of a price squeeze caused by past rates binding on the antitrust courts."

#### 2. Determining the Reasonableness of Present Rates:

The United States at 23:

"[I]n some cases the Commission's standards may be sufficiently clear and applicable to the facts that the court could apply them without the Commission's expertise." (Emphasis added.)

#### The United States at 22-23:

"As long as the antitrust court limits itself to the competitive implications of the price squeeze and refrains from independent assessment of the reasonableness of the jurisdictional rates, there is no danger of an undesirable court-agency conflict arising." (Emphasis added.)

#### The United States at 23:

"[T]he [antitrust] court should be bound by the Commission's determination of the reasonableness of the wholesale rates only with respect to their cost and all of the other factors traditionally applied in such a ratemaking determination." (Emphasis added.)

#### The Commission at 18:

"If, in its pending proceeding, the Commission were to conclude under Conway that the differential between the wholesale and retail rates is justifiable and not the product of anticompetitive manipulation, and therefore approved the wholesale rate as just and reasonable, established ratemaking principles indicate to the Commission that a court would be bound by such a determination.

"The Commission believes that such a conclusion is required because decisions of this Court indicate that only the agency charged by statute with ratemaking responsibilities has jurisdiction to determine whether rates are just and reasonable; any other conclusion would present a risk of conflicting determinations and standards concerning the reasonableness (and therefore the lawfulness) of rates that is inconsistent with basic principles of rate regulation. [Citations omitted.]" (Emphasis added.)

#### 3. Determining the Existence of a Wholesale-Retail Price Differential:

The Commission at 20-21:

"[The Commission] must also consider 'not only " " the existence of a difference between jurisdictional and non-jurisdictional rates, but also " " the anticompetitive impact of the particular magnitude of [the] rate differential.' [Citation omitted.] These questions involve expert exploration of the reasons for the differential, including the competing systems' operating costs and the engineering and generating factors bearing on those costs. [Citations omitted.]" (Emphasis added.)

#### The United States and the Commission at 16:

"Respondents' complaint raises several factual issues that do not call for the application of the Commission's expertise and that should be considered in the first instance by the district court. These include the following: \* \* are petitioner's present retail rates to large industrial users in fact lower than present wholesale rates; [footnote omitted] were petititioner's past retail rates in fact lower than past wholesale rates; \* \* \* " (Emphasis added.)

#### 4. Determining of the Ultimate Issue:

The United States at 22-23:

"As long as the antitrust court limits itself to the competitive implications of the price squeeze and refrains from independent assessment of the reasonableness of the jurisdictional rates, there is no danger of an undesirable court-agency conflict arising." (Emphasis added.)

The Commission at 18:

"If, in its pending proceeding, the Commission were to conclude under Conway that the differential between the wholesale and retail rates is justifiable and not the product of anticompetitive manipulation, " " established ratemaking principles indicate to the Commission that a court would be bound by such a determination." (Emphasis added.)

#### The Commission at 19:

"In the Commission's view, this Court's decision in Conway establishes that one of the criteria for determining the reasonableness of jurisdictional wholesale rates is the effect on competition of the relationship of that rate to the non-jurisdictional retail rate. Since the Commission's assessment of that effect is integral to its determination of the reasonableness of the wholesale rate (and vice versa) that assessment must, in the agency's view, be binding on the antitrust court. In sum, before the respondents can prevail on their antitrust complaint, the Commission must determine the ultimate issue of the reasonableness of the wholesale rates in relation to the retail rates." (Emphasis added.)

#### 5. Determining the Remedy:

The United States and the Commission at 12:

"That is, the court will be available to provide a complete remedy for the anticompetitive or monopolistic practices that the Commission cannot fully remedy, without interfering with the agency's authority." (Emphasis added.)

The United States and Commission at 17:

"Indeed, the court of appeals' statement that the district court may at some point refer to the Commismission 'to decide " " antitrust damages, or for other purposes' (Pet. App. 30a), indicates sensitivity of the court below to the proper balance between electric utility regulation and antitrust law enforcement. [Citation omitted.]' (Emphasis added.)

. . .

As is clear from the above, the views of the United States as augumented by the views of the Commission would preclude a district court from making any determination as to the justness and reasonableness of past rates (item "1" above); they would also preclude a district court from making any determination as to the justness and reasonableness of present rates (item "2" above); they would likewise preclude a district court from making any determination as to the existence of a wholesale-retail price differential (item "3" above); they would further preclude a district court from making any determination of the ultimate issue of the existence or non-existence of a price squeeze or of the anticompetitve effects of a price squeeze if the Commission should find one to exist (item "4" above); and finally, they would even preclude a district court from "decid[ing] \* \* \* antitrust damages, \* \* \* " (item "5" above).

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY.

V.

Petitioner.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
AND TOWN OF AVILLA, INDIANA,
MUNICIPAL CORPORATIONS, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

THOMAS R. EWALD

Counsel for Respondents

Of Counsel:

R. WYATT MICK, JR.
JAMES J. OLSON
DAUNE M. McDEVITT
JOHN M. RIGBY
THEODORE L. BENDALL
JAMES R. FLECK
EDWARD A. CHAPLEAU

December 16, 1977

910 Seventeenth Street, N.W. Washington, D.C. 20006 (202) 452-8004

#### TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION'	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
Facts	3
Court of Appeals Decision	6
ARGUMENT	6
I. Certiorari Should Be Denied	6
II. The Court of Appeals Correctly Held That the Federal Commission Does Not Have Exclusive Jurisdiction of the Antitrust Allegations in the Complaint	7
III. No State Action Immunizes I&M's Anticompetitive Practices From the Antitrust Laws	12
IV. The Court of Appeals Correctly Refused to Require the District Court to Defer to the Federal	
Commission	14
CONCLUSION	18

#### TABLE OF AUTHORTIES

	•
CASES:	Page
Bates v. State Bar of Arizona, U.S, 97 S. C. 2691 (1977)	
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) . 6,	11, 13, 15
City of Shakopee v. Northern States Power Co., F. Supp (D. Minn., October 19, 1976)8, 9,	
Federal Power Commission v. Conway Corp., 426 U.S. 27 (1976)	
Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945)	. 12
Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973)	. 9, 15
Northern States Power Co., FPC Docket No. ER76-81 (1977)	
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973 6, 9, 10,	
Parker v. Brown, 317 U.S. 341 (1943)	12, 13
Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973)	. 15
STATUTES:	
Sherman Act, Section 2, 15 U.S.C. § 2 2, 3, 4, 9, 1	0, 12, 13, 15
Clayton Act, Section 4, 15 U.S.C. § 15	
Clayton Act, Section 16, 15 U.S.C. § 26	. 23
Federal Power Act, Section 205, 16 U.S.C. § 824(d) 2	9.16
Federal Power Act, Section 206, 16 U.S.C. § 824(e)	
Title 28 U.S.C. § 1292(b)	. 3

#### IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

CITY OF MISHAWAKA. INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
and
TOWN OF AVILLA, INDIANA,
MUNICIPAL CORPORATIONS, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

#### **OPINIONS BELOW**

The District Court's opinion and order of May 1, 1975, denying Petitioner's motion to dismiss and alternative motion to stay, set forth in the Petitioner's Appendix at 31a, are not officially reported. They appear at 1975-1 CCH Trade Cas. ¶60,318 and at 18 P.U.R. 4th 175. The October 22, 1976 order of the District Court denying Petitioner's motion to reconsider, vacate, set aside and amend the court's order of May 1, 1975, set

forth at Pet. App. 54a, is not reported. The Court of Appeals' order and opinion, reported at 506 F.2d 1314 (7th Cir. 1977), are set forth at Pet. App. 6a and 7a.

#### **JURISDICTION**

The jurisdictional prerequisites are set forth in the Petition.

#### QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit correctly decided that the Federal Power Act does not deprive the District Court of jurisdiction to consider the plaintiff municipalities' complaint that the defendant electric power company, by filing rates before regulatory agencies in a way that prevents competition, violates the Sherman Act.

#### STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, is set forth at Pet. App. 4a. Sections 4 and 16 of the Clayton Act, § 5 U.S.C. § 15, 26, are set forth at Pet. App. 4a and 5a. Sections 205 and 206 of the Federal Power Act, 16 U.S.C. § 824(d) and § 824(e), are set forth at Pet. App. 1a and 3a.

#### STATEMENT OF THE CASE

Respondents are ten municipalities that operate their own electric distribution systems and depend for their supply of electric power on Indiana & Michigan Electric Company, a company that also competes against them for retail sales. The municipalities' complaint filed March 25, 1974 seeks relief pursuant to Section 2 of the Sherman Act against the defendant Company's otherwise unregulated practice of monopolizing and attempting to monopolize the business of selling electric power at retail. The complaint alleges that the defendant Indiana & Michigan Electric Company, ("I&M") by the wholesale rates it files before the Federal Power Commission (now the Federal

Energy Regulatory Commission), which automatically go into effect, requires the plaintiff municipalities to pay a higher price for electric power than the price the defendant charges its own comparable retail industrial customers, thereby preventing the plaintiffs from competing against the defendant for retail industrial sales. The complaint requests a declaratory judgment that I&M has violated the Act and an injunction against further violations, pursuant to Section 16 of the Clayton Act.

The Company's motion to dismiss the complaint on the grounds that the Commission has exclusive jurisdiction of the claims alleged by the complaint and the defendant's motion to stay proceedings pending the conclusion of proceedings before the Commission were denied by the District Court on May 1, 1975. On October 22, 1976 the District Court denied the Company's motion to vacate and set aside its previous order. The Company filed an interlocutory appeal under 28 U.S.C. § 1292(b), which was granted.

The Court of Appeals on August 16, 1977 affirmed the decision of the District Court.

#### **FACTS**

The municipalities' complaint alleges that I&M is a vertically integrated electric power company, which generates electric power, transmits the power throughout its service area, and delivers the power both to its wholesale customers, including the plaintiff municipalities, and directly to its own retail customers. [Complaint, para. 4; Pet. App. 57a.]. The defendant I&M is the only firm within its service area engaged in the business of transmitting and selling electric power at wholesale. The Company is the municipalities' only outside source of supply for wholesale electric power. [Complaint, para. 5; Pet. App. 57a.] I&M also dominates and controls the distribution and sale of retail electric power within its service area. The defendant Company has increased its control of the retail market by acquiring municipal electric utilities. Since 1957 the defendant has purchased the assets of four of the 20 municipal utilities within its service area, has absorbed their retail distribution facilities into the I&M system, and has taken over their retail industrial, commercial and residential customers. The Company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated electric systems serve retail customers in fewer than 10%. [Complaint, para. 6; Pet. App. 58a.]

The complaint alleges that I&M has monopolized and attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, by establishing a dual system of electric rates under which it has required the plaintiff municipalities beginning in 1973 to pay a new, higher wholesale price for electric power. In contrast to its previous practice the Company set its new wholesale price to municipalities at a substantially higher level than the Company's retail price to its own industrial customers. The difference between the Company's prices has prevented the plaintiffs from buying power from the Company at the new wholesale price and selling it to industrial customers at prices competitive with the Company's own retail prices and has exerted pressure on the plaintiff municipalities to sell or lease their electric utilities to the defendant Company. [Complaint, paras. 7-8; Pet. App. 58a-60a.] The Company's acts and practices have been done with the intent, and have had the effect, of monopolizing the distribution and sale of electric power at retail and have injured the plaintiff municipalities in their business and property in an amount exceeding \$1,000,000 before trebling. The complaint alleges that the plaintiffs' losses are continuing. Unless the relief requested by the complaint is granted, the defendant Company will continue to violate 15 U.S.C. Section 2. [Complaint, paras. 9-10; Pet. App. 60a-61a.]

The complaint requests declaratory and injunctive relief, including an order enjoining I&M from maintaining a disparity between the prices at which it sells electric power and under which it requires the plaintiff municipalities to pay a higher wholesale price than the retail prices at which it sells and distributes power to its own industrial customers.

On May 1, 1974 the defendant I&M moved to dismiss the complaint or to stay the District Court proceedings until the conclusion of the regulatory proceeding involving the rates Petitioner charges to its wholesale municipal customers, including the plaintiffs. The Commission proceedings referred to were the rate proceedings commenced by I&M's filing new wholesale rates before the Commission on June 13, 1972. At that time, the Commission refused to consider the anticompetitive effects of the Company's dual price system, because the Company's retail rats were beyond its jurisdiction.

The District Court denied the defendant's motions on May 1, 1975. [Pet. App. 31a.] Though the defendant contends that the complaint challenges the defendant's wholesale rates and retail rates, the Federal Commission's approval of wholesale rates, and the Indiana and Michigan state commissions' approval of retail rates, the District Court found that the complaint does not involve rate setting but instead seeks relief from the Company's monopolization through the practice of filing dual rates before separate agencies.

On October 22, 1976 the District Court denied 1&M's motion to reconsider, vacate, set aside and amend the District Court's order. [Pet. App. 54a.] By then an initial decision had been issued by an administrative law judge in the 1972 wholesale rate proceeding before the Federal Power Commission without producing any findings or decisions on the anticompetitive questions. Meanwhile, on May 28, 1976 the Company reestablished the dual price system on a higher level by requiring the municipalities, commencing in July 1976 to pay a new, higher price for electric power in excess of the retail price the Company charges its own industrial customers, thereby preventing the municipalities from competing against the Company for retail sales. Thereafter the parties to the 1972 rate case disposed of that proceeding by agreeing to a financial settlement based on the initial decision on cost of service principles only. [Transcript of District Court proceedings on Oral Argument, October 22, 1976.]

#### COURT OF APPEALS DECISION

On August 16, 1977 the Court of Appeals for the Seventh Circuit denied the Petitioner's interlocutory appeal and affirmed the May 1, 1975 and October 22, 1976 orders of the District Court. The Court of Appeals held that I&M's practice alleged by the complaint, of setting dual rates that discriminate against the Company's wholesale municipal customers in favor of its retail customers, is subject to the antitrust laws and that the Federal Power Commission does not have exclusive jurisdiction of the issues raised by the complaint. Following this Court's decision in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the Court of Appeals held that no state action has immunized the Company's practices from the operation of the antitrust laws.

The Court, following the decision in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), rejected 1&M's contention that the law requires the District Court to stay proceedings pending a final decision by the Federal Commission on 1&M's 1976 wholesale rate filing. While recognizing the District Court's discretion to defer to the Commission, the Court of Appeals found no circumstances compelling deferral in this case. Instead, the Court of Appeals observed that deferral could postpone antitrust relief until the defendant company's monopolization of the retail power business in its area is complete.

#### ARGUMENT

#### I. CERTIORARI SHOULD BE DENIED

There is no dispute among the parties that this is a case of first impression. There are no conflicting decisions from other circuits.

The Court of Appeals took this case on an interlocutory appeal. The case in the District Court has not progressed beyond I&M's motion to dismiss. There have been no discovery proceedings, no evidentiary hearings, and no findings of fact by the District Court.

The District Court correctly denied the Company's preliminary motion and was properly sustained on appeal. Denial of certiorari at this time will not foreclose any party's right to review after the case is decided on the merits.

# II. THE COURT OF APPEALS CORRECTLY HELD THAT THE FEDERAL COMMISSION DOES NOT HAVE EXCLUSIVE JURISDICTION OF THE ANTITRUST ALLEGATIONS IN THE COMPLAINT

The Petition argues that the Court of Appeals' decision disregards the "natural implications" of FPC v. Conway Corp., 426 U.S. 271 (1976), that the antitrust violations alleged by the complaint are within the exclusive jurisdiction of the Federal Commission. The municipalities allege that I&M is monopolizing the retail electric power business by filing rates before the Federal and state commissions so as to establish a dual price system that discriminates against the Company's competitors who depend on it for their supply of electric power. I&M claims that the municipalities' allegation should be adjudicated, if at all, before the Federal Commission in wholesale rate proceedings. However, as the Court of Appeals observed, the Commission lacks authority to remedy the antitrust violations alleged in the complaint or to prevent repeated violations in the future.

Nothing in the Supreme Court's opinion in Conway suggests exclusive jurisdiction, as defendant concedes (D. Br. 32). Indeed, Conway suggests that the FPC remedy is limited to setting the jurisdictional rate somewhere above the lower boundary of the zone of reasonableness. A rate set so low that it would fail to recoup fully allocated wholesale costs seems to be beyond the Commission's power. 426 U.S. at 278. If the retail rates have been set so low by the state utility commissions that a price squeeze could only be fully remedied by setting the wholesale rates below the

lower boundary of the zone of reasonable recovery for fully allocated costs, the squeeze would go unremedied to the extent a wholesale rate set at the lower boundary of the zone of reasonableness did not cure the problem. Although *Conway* was brought to the district court's attention, it refused to vacate its order declining to dismiss the complaint and to stay the action. [Pet. App. 15a-16a.]

The Federal Commission itself concedes that it lacks exclusive jurisdiction over conduct of the sort alleged here, and that it lacks the authority to grant the necessary relief. As the Court of Appeals stated:

[i]ndeed the Federal Power Commission has conceded that it does not have exclusive jurisdiction over conduct such as that alleged here... On May 23, 1977, the Federal Power Commission released an order in Northern States Power Company, FPC Docket No. ER 76-818, stating that the Commission's examination of the alleged price squeeze would not affect the district court action in Shakopee because

"That action seeks damages for allegedly anticompetitive activity that occurred in the past. As the District Court noted in its October 18, 1976, order denving Northern States' motion to dismiss, should Shakopee prove itself entitled to relief the regulatory process would not be disrupted by an award of damages for past conduct nor by an enjoining of certain future conduct. These remedies are beyond our jurisdiction as we cannot look to past rate schedules and, if a price squeeze were found, we could not take any remedial action. Accordingly there is no alternative to this issue being litigated in both forums, one concerning itself with present rates and the other with past rates and possible future conduct." [Pet. App. 20a-21a.]

Contrary to the Company's claim, antitrust proceedings before the District Court will not disrupt wholesale rate proceedings before the Commission. As the Court of Appeals held:

[i] the plaintiffs prove their case, instead of interfering with any rates approved by the Federal Power Commission, in addition to possible damages, the district court would presumably order defendant to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendant's industrial customers. The court would thus not be affording a remedy that would "starkly conflict with the explicit stautory mandate of the Federal Power Commission \* \* \* [or] improperly preemp[t] the jurisdiction of the Federal Power Commission. \* \* \*." Otter Tail Power Co., supra, 410 U.S. at 395 (concurring and dissenting opinion of Justice Stewart). As shown from the opinion below and from the opinion in Shakopee, supra, the district court intends to apply the antitrust laws "to the public utility industry only to the extent that the antitrust claims asserted are not within the reach of the regulatory agency's supervision," the very standard recommended by defendant (Br. 21). Under Otter Tail Power Co., supra, and Gulf States Utilities Co., supra, in fashioning any relief that may be warranted under the Sherman Act, the judiciary must be careful to avoid or resolve any inconsistency with Section 205 of the Federal Power Act. We are confident that the district court will observe this stricture.

Indeed the opinions of the district courts in this case and in *Shakopee* show that they do not intend to interfere with the Federal Power Commission's jurisdiction, because if the Commission should find the respective defendant's higher wholesale rates to be just, the courts would, on proof of violations of Section 2 of the Sherman Act, order the defendants to initiate new rate structures eliminating the dual price system of

higher wholesale prices. If the Commission should find the present wholesale rates to be unjust, then the courts would only enjoin the defendants from future dual systems violative of the Sherman Act. Both district courts noted too that it would not disrupt the regulatory process to award damages for any past anti-competitive conduct proved at trial. Therefore, a stay is unnecessary to avoid a clash between the antitrust laws and the Federal Power Act. [Pet. App. 26a-27a.]

The Federal Power Act has not impliedly repealed the antitrust laws in the electric power industry or with respect to the anticompetitive practices alleged by the complaint in this case. In Otter Tail Power, supra, this Court held:

[t]here is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

\* \* \*

It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment an dnot regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. See United States v. Radio Corp. of America, supra, 358 U.S. at p. 351. This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with "restraint of free and independent competition" among public utility holding companies. See 15 USCA Section 29a(b)(2). [410 U.S. at 373-374.]

Though the Act authorized the Commission to compel the defendant Otter Tail to interconnect with the municipal systems and sell them power, the Act did not thereby delegate antitrust enforcement to the Commission or remove antitrust jurisdiction from the District Court. The standard governing the Commission's decision whether to order interconnection is whether

such action is "necessary or appropriate in the public interest." Although antitrust considerations may be relevant, they are not determinative. [410 U.S. at 373.]

The power company's argument in the present case for exclusive jurisdiction in this case is weaker than the company's argument in Otter Tail. Though the FPC had full authority to remedy Otter Tail's refusal to sell power to municipal utilities, the Commission has no authority to enjoin I&M's practice of filing dual wholesale and retail rates in the future. Though the Commission may issue orders altering particular wholesale rates after I&M files them and may consider the retail rates filed by the Company in arriving at its wholesale rate orders, the Commission has no authority to affect the Company's retail rates directly, or to prevent the Company from repeatedly filing discriminatory wholesale rates to its customers. [FPC v. Conway Corp., supra, 276-277.]

In its decision the Court of Appeals, following Otter Tail, held:

[w]ith respect to implying a repealer of the antitrust acts, Judge Lord began with the now settled axiom that after Otter Tail power Co. v. United States, 410 U.S. 366, "there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." Cantor, supra, at 596 n.35. Since the antitrust laws are not generically superseded by the regulation of electric utilities, the only question open to debate is whether "the particular application of the [antitrust laws] is irreconciliably repugnant to the operation of the regulatory scheme." Id. Judge Lord

decided that there was "little or no apparent conflict between applying the antitrust laws to the type of conduct complained of here and the smooth and efficient functioning of the FPC's regulatory system" (mem. op. 5). As in *Shakopee*, the price squeeze alleged in our case

"is not between rates set by one regulatory agency, as was the case in Georgia [v. Pennsylvania R. Co., 324 U.S. 439], but rather is between the 'wholesale' rate set by the FPC and the 'retail' rate over which the FPC has no jurisdiction. Put simply, under these circumstances, antitrust immunity is not 'necessary' to the functioning of the regulatory process because the discrimination is 'external' to that process. The FPC does not control both ends of the discriminatory conduct." (mem. op. 7 n.6)

If plaintiff proves it is entitled to relief on the Sherman Act claim asserted in its complaint, the Federal Power Commission's regulatory process would not be disturbed by the court's awarding damages for past anticompetitive conduct or by enjoining future anticompetitive conduct by defendant in making and prompting its rate applications. Thus relief could be granted without the district court's actually becoming involved in the process of setting rates. [Pet. App. 19a-20a.]

# III. NO STATE ACTION IMMUNIZES I & M'S ANTICOMPETITIVE PRACTICES FROM THE ANTITRUST LAWS

The petition contends that the doctrine of *Parker v. Brown*. 317 U.S. 341 (1943), exempts the Company from antitrust review of its practice, as alleged, of filing different rates before different commissions so as to monopolize the retail electric power business in its area. However, as the complaint shows and the

Court of Appeals found, the municipalities do not challenge rates established by state agencies, nor do they challenge state action of any kind.

As in Cantor, the plaintiff municipalities have named no state officials or state agencies in the complaint, and there is no claim that any state action violated the antitrust laws. See 428 U.S. at 591-592. Thus under the plurality opinion, Parker v. Brown does not even arguably apply to the facts of our case. Nor do Chief Justice Burger or Justice Blackmun's concurrences in Cantor give defendant solace. The challenged activity here is a dual rate structure. The state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant. The price squeeze has not been blessed by Indiana or Michigan. The fact that the district court has no authority to maintian a direct attack on the defendant's retail rates does not alter the reality that the state commissions have in no way placed a badge of approval on the defendant's dual rate structure. Consequently, defendant's conduct is not immunized under Parker v. Brown.

Having decided that the Sherman Act applies in the first instance to the conduct at issue here, we must decide whether an exemption nonetheless has been worked. Justice Stevens, in a portion of Cantor subscribed to by a majority of the Court, suggested two geneses for such an exemption. First, it might be unjust to hold a private citizen liable for conduct imposed by the direct command of the sovereign. Secondly, if the sovereign is already regulating an area, Congress may not have intended to superimpose the antitrust laws as an additional and perhaps conflicting regulatory scheme.

In City of Shakopee v. Northern States Power Co., Civ. No. 4-75-591 (D. Minn. 1976), a post-Cantor case in Ving a virtually identical dual rate structure creating a price squeeze between the wholesale and

retail sale of electric power, Judge Lord concluded that no exclusive jurisdiction existed in the Federal Power Commission because an exemption from the antitrust laws could not be implied. Judge Lord interpreted the first genesis for exemption under *Cantor* to be based on the reasoning that

"if an anticompetitive practice is the product, at least in part, of the company being regulated and could be avoided if the company chose to do so, then the anti-competitive condition is in reality the work of that company and is not 'necessary' to the functioning of the regulatory scheme and will not be immunized from antitrust liability." (mem. op. 6)

Accordingly, the court noted that, as here, defendant Northern States Power Co. could have avoided the alleged monopolistic position by "tailoring its applications to allow for competitive 'wholesale' and 'retail' power rates" (mem. op. 7) and that, given such company autonomy, this position was not "necessary" to the functioning of the regulatory scheme. [Pet. App. 17a-19a.]

Bates v. State Bar of Arizona, \_\_\_\_\_ U.S. \_\_\_\_, 97 S. Ct. 2691 (1977), on which the Company relies heavily, involved a direct challenge to state action and is inapplicable for the reasons given in the Court of Appeals' analysis.

# IV. THE COURT OF APPEALS CORRECTLY REFUSED TO REQUIRE THE DISTRICT COURT TO DEFER TO THE FEDERAL COMMISSION

The Court of Appeals sustained the District Court's exercise of its discretion in refusing to delay this case pending a final decision by the Federal Commission in the administrative proceedings arising out of the Company's 1976 wholesale rate filing. In its disposition of the case the Court of Appeals provided as follows:

While we are holding that the district court need not stay further proceedings herein, we agree with Judge Grant that if the district court should ever find it necessary to ascertain particular Commission action in order to decide the exact scope of antitrust damages, or for other purposes, the court may then stay its hand for the purpose of awaiting the Commission result. [Pet. App. 30a.]

The Petition argues that the Court of Appeals erred in not requiring the District Court to postpone proceedings until the rate case before the Commission is concluded. However, the law does not require deferral in the circumstances of this case. As the Court stated:

The defendant argues that since "some facets of the dispute \* \* \* are within the statutory jurisdiction of the [Federal Power] Commission," Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 302-here the Conway-dictated duty to set the jurisdictional rate with an eye to any price squeeze between it and the non-jurisdictional rate-the Federal Power Commission must be deemed to preempt antitrust jurisdiction. However, that position was also foreclosed by Otter Tail Power Co., supra. There only the dissenting Justices would have required the antitrust court to defer to the Commission proceedings. 410 U.S. at 392-395. The other Justices affirmed a decree under Section 2 of the Sherman Act (except in one respect immaterial here) without requiring a stay where there was only a potential conflict between the federal judicial decree and a future order of the Federal Power Commission. 410 U.S. at 376-377. Any suspicions that the 4-3 vote in Otter Tail impairs its authority seem wholly unwarranted in light of the Cantor majority's repeated citations of it with approval. See also Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 758. [Pet. App. 22a-23a.1

The Court found that no conflict is likely. [Pet. App. 27a.] Under its disposition of the case, the District Court has discretionary authority to defer, if a potential conflict appears which makes deferral necessary.

Assuming that a discretionary stay could be appropriate even when primary jurisdiction is not in the Federal Power Commission, the district court certainly did not abuse its discretion here. Indeed, the equities weigh heavily in favor of the plaintiff municipalities. The Illinois Municipals point out that the district court should be permitted to proceed in order to avoid the typical lengthy delays that occur in processing wholesale rate increases under Section 205 of the Federal Power Act (16 U.S.C. § 824d). Under that provision, a public utility files its rate increase application no less than 30 days before the effective date thereof, and the Commission typically suspends the proposed rate from one day to five months, with refunds required if the rate is found to be above the statutory "just and reasonable" standard. The wholesale rate increase in the present case stems from a June 13, 1972 application by defendant, and the case was not terminated in the Commission until it approved a settlement on June 1, 1977, a span of five years. Except for the settlement, the case would still pend before the Commission.

Thus far, the Commission has never rejected a rate filing on price squeeze or other antitrust grounds, and there is no limit on the number of filed increases that may be in effect at the same time under Section 205. Simply by filing an anti-competitive increase and waiting for time to pass, a public utility like defendant can place a price squeeze on wholesale customers. As the Commission has stated, "electric utilities are permitted to file virtually any level of costs and rates and after a period of suspension charge those rates subject to refund, pending Commission decision." [FPC Order No. 487, 50 FPC at 127 (1973).]

Under this procedure, the price squeeze can continue between the time the Commission allows the rates to go into effect and its final order, for the new Conway remedy as to price squeezes does not become effective until then. Thus if a stay were granted to defendant. plaintiffs and customers in similar positions would be unable to secure any relief from price squeezes like this until the Commission finally approved the filed rates. As the Illinois Municipals have picturesquely put it:

"Delay, combined with the multiple rate increases, could mean that the customer has been put out of business by his suppliercompetitor. You cannot give refunds to a corpse." (Br. 27-28.)

Furthermore, the Commission would be unable to afford complete relief because the Federal Power Act does not provide for damages or for an injunction against a utility violating the antitrust laws. Thus a stay in this case would excuse defendant's alleged non-compliance with the antitrust laws for a completely unnecessary length of time. [Pet. App. 28a-30a.]

If the current administrative proceeding moves at the same pace as the Commission's 1972 proceeding, it will not produce an initial decision by an administrative law judge until 1980, or six years after the filing of the District Court case. Additional time will elapse if the initial decision is reviewed by the Commission itself and appealed by I&M or any other party. Meanwhile, the effects of the Company's practice, alleged by the complaint, of repeatedly filing rates that maintain a dual price system continue to exert pressure on the municipalities to drop out of the electric utility business and to sell or lease their municipal utilities to their competitor-supplier, I&M.

# CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS R. EWALD

Counsel for Respondents

910 Seventeenth Street, N.W.

Washington, D.C. 20006

(202) 452-8004

# Of Counsel:

R. WYATT MICK, JR.
JAMES J. OLSON
DAUNE M. McDEVITT
JOHN M. RIGBY
THEODORE L. BENDALL
JAMES R. FLECK
EDWARD A. CHAPLEAU

December 16, 1977

IN THE

DEC 29 1977

# Supreme Court of the United States RODAK, JR., CLERK

October Term, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY.

Petitioner.

V.

CITY OF MISHAWAKA, INDIANA. CITY OF NILES, MICHIGAN, CITY OF COLUMBIA CITY, INDIANA, CITY OF BLUFFTON, INDIANA, CITY OF GARRETT, INDIANA, CITY OF GAS CITY, INDIANA, TOWN OF FRANKTON, INDIANA, TOWN OF WARREN, INDIANA, TOWN OF NEW CARLISLE, INDIANA, and TOWN OF AVILLA, INDIANA, municipal corporations.

Respondents.

# PETITIONER'S REPLY BRIEF

WHITNEY NORTH SEYMOUR Counsel for Petitioner One Battery Park Plaza New York, New York 10004 (212) 483-9000

Of Counsel:

RICHARD M. DICKE PETER J. SCHLESINGER DENNIS G. JACOBS SIMPSON THACHER & BARTLETT

THOMAS W. YODER LAWRENCE A. LEVY LIVINGSTON, DILDINE, HAYNIE & YODER

December 28, 1977

# TABLE OF CONTENTS

	PAGE
Point I—Respondents, joined by the Illinois amicus curiae, have placed unwarranted reliance on this Court's decision in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	2
Point II—Nine of the respondents have instituted a new antitrust action in which they seek to enjoin rate filings by, among others, Indiana & Michigan Electric Company	
Conclusion	9
Appendix	
Complaint in City of Mishawaka, Indiana, et al., Plaintiffs v. American Electric Power Company, Inc., et al., Defendants, Civil Action No. S77-0209	
TABLE OF CASES	
American Telephone and Telegraph Company v. United States, Docket No. 77-372	3
Bluefield Water Works & Improvement Company v. Pub. Serv. Comm. of the State of West Virginia, 262 U.S. 679 (1923)	
Continental T.V., Inc. v. GTE Sylvania, Incorporated, —— U.S. ——, 97 S. Ct. 2549 (1977)	
Florida Power Corporation v. FPC, 425 F.2d 1196 (5th Cir. 1970)	3
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	4, 5, 6
United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)	

# Supreme Court of the United States

October Term, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
and
TOWN OF AVILLA, INDIANA,
municipal corporations,

Respondents.

# PETITIONER'S REPLY BRIEF

Petitioner Indiana & Michigan Electric Company files this Reply Brief in support of its Petition that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review its order and judgment (Appendix at 6a1) and its opinion (7a), both issued August 16, 1977.

Citations with the suffix "a" are to the Appendix to Indiana & Michigan Electric Company's Petition filed on November 14, 1977.

The Brief in Opposition filed by Respondents and the Brief Amicus Curiae filed in opposition by certain Illinois municipalities erroneously rely on Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), to support their opposition to the grant of the Petition herein sought.

In addition, nine of the Respondents have just filed a further civil antitrust action in the same Indiana federal district court from which the instant case emanates. That new civil antitrust action is but an effort to accomplish a further extension of the decision below in that the relief sought, in addition to trebled damages, is a permanent injunction restraining Indiana & Michigan Electric Company and the other named defendants "during the pendency of this action from putting into effect and charging the plaintiff a new, higher wholesale price for bulk power which requires the plaintiffs to pay more than the rates then in effect to [Indiana & Michigan Electric Company's] retail industrial customers."

I

Respondents, joined by the Illinois amicus curiae, have placed unwarranted reliance on this Court's decision in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

The Otter Tail decision states in part:

"There is nothing in the legislative history [of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an over-

riding policy of maintaining competition to the maximum extent possible consistent with the public interest." (410 U.S. at 373-374).

While we do not quarrel with that statement it must, however, be read in the context in which it was made, namely, a discussion of the legislative history of the Federal Power Act which on the one hand resulted in the inclusion of Section 202(b) (dealing with the authority of the Federal Power Commission [now Federal Energy Regulatory Commission] to compel involuntary interconnections of power) and which, on the other hand, eliminated from the Act the authority which would have allowed the Federal Power Commission to order the "wheeling" of electric power and energy. (410 U.S. at 373-374).

It is this recognition of the true import of the Court's Otter Tail decision that reinforces the need for granting the Petition here, and that need is not adversely affected by the Court's recent denial of the Petition in American Telephone and Telegraph Company, et al. v. United States, Docket No. 77-372.3 The Petition there sought virtually a blanket exemption from the operation of the antitrust laws; Indiana & Michigan Electric Company's Petition acknowledges those areas in which the Court has recognized the existence of federal district court antitrust jurisdiction, but argues that such jurisdiction does not extend to matters so central to the regulatory schemes of both the federal and state util-

<sup>2. &</sup>quot;Wheeling is where A, which has excess generating capacity, seeks to transmit power to its customer C with whom it has no transmission connection, by using the transmission facilities of B, which has connections with both A and C." Florida Power Corporation v. FPC, 425 F.2d 1196 at 1202, n.17 (5th Cir. 1970).

<sup>3.</sup> Certiorari denied, November 28, 1977.

ity commissions as the rates charged by a utility for sales at wholesale (now committed to the jurisdiction of the Federal Energy Regulatory Commission) and its retail rates (committed as they are to the jurisdiction of the appropriate state commission).

This Court, in concluding its discussion under Part I of its Otter Tail decision, stated:

"Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections [under Section 202(b) of the Act] was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations." (410 U.S. at 374-375) (emphasis supplied).

Part I of the Court's decision in Otter Tail should not be read expansively nor as going beyond its express holding that the absence of authority to order the wheeling of electric power in the Federal Power Act created a "gap" in the regulatory scheme committed to the jurisdiction of the Federal Power Commission, and that void, therefore, prevented the application of the doctrine of implied repeal for which we contend in the instant Petition.

Part II of the Otter Tail opinion contains this Court's analysis of the district court's decree enjoining Otter Tail from refusing to sell electric power at wholesale and from refusing to wheel electric power over its transmission lines. This Court particularly noted that the decree also provided:

"The defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission." (410 U.S. at 375) (emphasis supplied).

In reviewing that facet of the district court's decree, the Court clearly indicated again that the Federal Power Commission had no authority to order the wheeling of electric power and concluded therefore that:

"Insofar as the District Court ordered wheeling to correct anticompetitive and monopolistic practices of Otter Tail, there is no conflict with the authority of the Federal Power Commission." (410 U.S. at 376).

This Court then considered that portion of the district court's decree which ordered interconnections between Otter Tail and the municipalities which had protested the activities of Otter Tail. Once again, the Court noted that since the Federal Power Commission had itself ordered an interconnection between Otter Tail and Elbow Lake, the district court's decree "presents no actual conflict between the federal judicial decree and an order of the Federal Power Commission." (410 U.S. at 376). This Court then addressed the potential of future conflict with respect to the retention by the district court of jurisdiction to carry out its decree and concluded its discussion by stating:

"It will be time enough to consider whether the antitrust remedy may override the power of the Commission under §202(b) as, if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it. At present, there is only a potential conflict, not a present concrete case or controversy concerning it." (410 U.S. at 377).

Finally, in Part V of its Otter Tail decision, the Court discussed Otter Tail's claim that its actions were under-

taken in its own self-interest. In affirming the rejection of that argument, the Court cited its decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and particularly its statement that:

"The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." (410 U.S. at 380, citing Arnold, Schwinn & Co., 388 U.S. at 375.)

The Court clearly recognized that the district court in retaining jurisdiction over the parties "presumably will give effect to the policies embodied in the Federal Power Act..." (410 U.S. at 382). That is a clear statement of the interrelationship which exists between a federal district court and the Commission and of the great potential for conflict between them, the main point of the present Petition. Moreover, in its recent decision in Continental T.V., Inc., et al. v. GTE Sylvania, Incorporated, — U.S. —, 97 S.Ct. 2549 (1977), this Court overruled the per se rule announced in Schwinn and returned "to the rule of reason that governed vertical restrictions prior to Schwinn" (97 S.Ct. at 2562).

Clearly, the application of "the rule of reason" to the circumstances of this case should result in the insulation of Indiana & Michigan Electric Company from antitrust liability with respect to the rates which it charges to its wholesale and to its retail customers. Those rates are the product of the action of federal and state regulatory agencies to whose rate setting jurisdiction Indiana & Michigan Electric Company is subject. It has been established for over half a century that the actions of a state regulatory commission in "[t]he prescribing of rates is a legislative

act. The [state] commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature." Bluefield Water Works & Improvement Company v. Pub. Serv. Comm. of the State of West Virginia, 262 U.S. 679, 683 (1923).

Reliance by Respondents and by amicus curiae who support Respondents on a reading of Otter Tail which extends it unduly may properly be deemed questionable also in light of the fact that in both Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975), and United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975), an implied repeal of the antitrust laws in a regulated industry was found to exist and that the opinions in those cases were written by the two Justices who did not participate in Otter Tail.

# H

Nine of the respondents have instituted a new antitrust action in which they seek to enjoin rate filings by, among others, Indiana & Michigan Electric Company.

We have argued in the Petition that the opinion below would inevitably lead to encouragement of attacks upon the rate structures of electric utilities and to attempts by district courts to assume jurisdiction over such attacks rather than leaving them for determination by the appropriate forum, the Federal Power Commission (now Federal Energy Regulation Commission) and the appropriate state utility commission.

Our prediction has now been fully borne out by the new civil antitrust action instituted by nine of the Respondents herein on December 13, 1977, while this Petition was pending. That action, instituted in the same federal district court from which this proceeding emanates, seeks not only trebled damages but injunctive relief which would bar Indiana & Michigan Electric Company and the other named defendants, during the pendency of that action, from resorting to the proper regulatory jurisdiction by making certain filings with the Federal Energy Regulatory Commission.<sup>4</sup>

The decision below has thus become a vehicle for frustrating the normal channels of regulation by transfering the regulatory process to a federal district court. Before the effects of such a transfer become utterly unmanageable, on a nation-wide basis, this Court should review the decision below and return regulation to the administrative agencies which have the expertise to set at just and reasonable levels electric utility rates, a function which is central to their existence. Federal district courts are already sufficiently, if not overwhelmingly, burdened without there being added to their case loads the inevitable spate of lawsuits which the decision below will necessarily generate. Congress has shown no disposition to add public utility rate regulation to the new fields for district court jurisdiction.

-----

#### Conclusion

Indiana & Michigan Electric Company submits that the events which led to the filing of its Petition and those which have occurred since fully confirm the need for the grant of the Petition for a Writ of Certiorari in this case, before the federal district courts are inundated with civil antitrust actions for which there is no jurisdictional basis. Grave damage to the public interest, to an orderly system of regulation and to the other work of the district courts would all have been done before conflicts between the Circuits could be expected to develop.

# Respectfully submitted,

WHITNEY NORTH SEYMOUR

Counsel for Petitioner

One Battery Park Plaza

New York, New York 10004

(212) 483-9000

#### Of Counsel:

RICHARD M. DICKE
PETER J. SCHLESINGER
DENNIS G. JACOBS
SIMPSON THACHER & BARTLETT

THOMAS W. YODER
LAWRENCE A. LEVY
LIVINGSTON, DILDINE, HAYNIE & YODER

December 28, 1977

<sup>4.</sup> The Complaint is filed in Civil Action No. S 77-0209 and is reproduced in the Appendix to this Reply. Attention is called particularly to paragraph numbered "4" in the prayer for relief appearing at page A8.

APPENDIX

1

#### IN THE

#### UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

Civil Action No. S77-0209

CITY OF MISHAWARA, INDIANA,

CITY OF NILES, MICHIGAN,

CITY OF COLUMBIA CITY, INDIANA,

CITY OF BLUFFTON, INDIANA,

CITY OF GARRETT, INDIANA,

CITY OF GAS CITY, INDIANA,

Town of Frankton, Indiana,

Town of Warren, Indiana, and

Town of New Carlisle, Indiana,

Municipal corporations,

Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Defendants.

Plaintiffs allege as follows:

I.

# Jurisdiction and Venue

1. This is an action by nine municipalities that operate their own electric distribution systems against the compa-

nies that control their supply of wholesale electric power and also compete against them for retail sales. The plaintiff municipalities request relief against the defendant companies' monopolization of and attempt to monopolize the distribution and sale of electric power at retail within the area in which they do business, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2. The plaintiffs request a declaratory judgment, preliminary and permanent injunctive relief, and treble damages.

2. This court has jurisdiction over this case by virtue of Sections 4 & 16 of the Clayton Act, 5 U.S.C. §§5, 26. The defendant companies transact business within the South Bend Division of the Northern District of Indiana.

#### П.

#### Parties

3. The plaintiffs, City of Mishawaka, Indiana; City of Niles, Michigan; City of Columbia City, Indiana; City of Bluffton, Indiana; City of Garrett, Indiana; City of Gas City, Indiana; Town of Frankton, Indiana; Town of Warren, Indiana; and Town of New Carlisle, Indiana, are municipal corporations located within the service area of the defendant Indiana & Michigan Electric Company ("I&M"). Each of the plaintiffs operates its own electric utility, through which it purchases bulk power at wholesale from the defendant Indiana & Michigan Electric Company and sells and distributes the electric power at retail to customers within its corporate limits and in nearby areas.

# Complaint

All of the plaintiff municipalities have been wholesale customers of the defendant Indiana & Michigan Electric Company for many years.

- 4. The defendant American Electric Power Company, Inc. ("AEP") is incorporated under the laws of the State of New York. AEP is a public utility holding company, which owns and controls the American Electric Power System, consisting of the defendant American Electric Power Service Corporation, the defendant Indiana & Michigan Electric Company, and other member companies that generate, transmit, and distribute electric power to customers in the States of Indiana, Michigan, Ohio, Kentucky, Tennesee, Virginia, and West Virginia.
- 5. The defendant American Electric Power Service Corporation ("AEP Service Corp.") is incorporated under the laws of the State of New York. AEP Service Corporation furnishes management, advisory, and other services to the defendant I&M and the other member companies of the AEP System. The defendant AEP Service Corporation and its employees participate in preparing and filing electric rates on behalf of the defendant I&M and in representing the interests of I&M in rate proceedings before state and Federal regulatory commissions.
- 6. The defendant Indiana & Michigan Electric Company is incorporated under the laws of the State of Indiana. The defendant I&M is a vertically integrated electric power company that generates electric power, transmits the power throughout its service area, and delivers

the power both to its wholesale customers, including the plaintiffs, and directly to its own retail industrial, commercial and residential customers. I&M's service area covers 7,740 square miles in southwestern Michigan and northern Indiana.

#### Ш.

## Nature of Trade and Commerce

- 7. Wholesale market. The defendant I&M is the only firm engaged in the business of transmitting and selling bulk electric power at wholesale for ultimate distribution to customers in its service area. I&M is the plaintiff municipalities' only available outside source of supply for wholesale electric power. Plaintiffs Mishawaka, Indiana; Columbia City, Indiana; Garrett, Indiana; Gas City, Indiana; Frankton, Indiana; Warren, Indiana; and New Carlisle, Indiana, depend on the defendant I&M for all of their requirements of wholesale electric power for distribution and sale to their customers. Plaintiffs Niles, Michigan, and Bluffton, Indiana, which operate generation facilities, nevertheless depend on I&M for more than 95% of their requirements of electric power for distribution and sale to their retail customers.
- 8. Retail market. The defendant I&M also dominates and controls the sale of electric power at retail within its service area. I&M has more than 425,000 retail customers and sells more than 80% of the electric power sold at retail in its service area. I&M's wholesale customers, including the plaintiff municipalities, sell less than 20%. The plain-

# Complaint

tiff municipalities compete against the defendant I&M and the AEP System for sales of electric power at retail to industrial, commercial and residential customers.

9. The defendant I&M has increased its control of the retail market within its service area by acquiring municipal electric utilities. Since 1957 I&M has purchased or leased the assets of five of the 20 municipal utilities within its service area, has absorbed their retail distribution facilities into its retail distribution system, and has taken over all their industrial, commercial and residential customers, as follows: Kendallville, Indiana (1957); Decatur, Indiana (1959); Portland, Indiana (1963); Albion, Indiana (1966); and Fort Wayne, Indiana (1975). Fort Wayne is the largest city in I&M's service area. At the time of its takeover by I&M, Fort Wayne's municipal electric utility served 33,185 retail customers.

#### IV.

# Violations of Law

- 10. The defendants have monopolized and have attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, as follows:
- (a) Though at all times until 1973 the defendants, through Indiana & Michigan Electric Company, sold bulk electric power at wholesale to the plaintiff municipalities at or about the same price they charged I&M's retail industrial customers for bulk power, the defendants now require

the plaintiff municipalities to pay a substantially higher wholesale price for bulk electric power than the price they charge I&M's retail industrial customers. As a result the plaintiff municipalities have become financially unable to buy bulk power at the defendants' new wholesale price and to sell it to their own residential, commercial and industrial customers at prices competitive with I&M's retail industrial, commercial and residential prices;

- (b) The defendants threaten to raise further the wholesale price they require the plaintiff municipalities to pay for bulk electric power, thereby increasing the amount they require the plaintiffs to pay in excess of the price the defendants charge I&M's retail industrial customers for bulk power.
- 11. The defendants' adoption of a new wholesale price to the plaintiff municipalities in excess of the prices at which they sell bulk electric power to I&M's retail industrial customers has caused and threatens to cause the following consequences:
- (a) The defendants have impaired the plaintiffs' ability to compete against them for retail sales to residential, commercial and industrial customers, and
- (b) By requiring the plaintiff municipalities to increase their retail prices to their own residential, commercial and industrial customers above the level of the defendants' lower retail prices, the defendants have caused the municipalities' customers to exert pressure on the municipalities to sell or lease their electric utilities to the defendant I&M so they can purchase electric power at the defendants' lower retail prices.

### Complaint

12. The acts and practices of the defendants alleged herein have been done with the intent, and have had the effect, of monopolizing part of the trade and commerce among the several states in the distribution and sale of electric power at retail to the injury of the plaintiff municipalities in their business and property in an amount exceeding \$50,000,000 before trebling. The plaintiffs' losses are continuing.

13. Unless the relief requested by this Complaint is granted, the defendant companies will continue to violate 15 U.S.C. §2.

V.

# Relief

WHEREFORE, plaintiffs pray as follows:

- 1. For a declaratory judgment that the defendants have violated 15 U.S.C. §2 by monopolizing and attempting to monopolize the distribution and sale of electric power at retail within the defendant I&M's service area.
- 2. For an order enjoining the defendant companies, their officers, agents, employees, successors and all persons in active concert or participation with them, from violating 15 U.S.C. §2.
- 3. For an order enjoining the defendants from creating or maintaining a disparity between the prices at which the defendant I&M sells bulk electric power by requiring the

plaintiff municipalities to pay a higher wholesale price for bulk power than the prices at which I&M sells and distributes bulk power to its retail industrial customers.

- 4. For an order restraining the defendants during the pendency of this action from putting into effect and charging the plaintiffs a new, higher wholesale price for bulk power which requires the plaintiffs to pay more than the rates then in effect to I&M's retail industrial customers.
- 5. For an order awarding the plaintiffs treble the amount of damages they have sustained as a result of the defendants' violations of 15 U.S.C. §2.
- 6. For an order awarding the plaintiffs reasonable attorneys' fees, together with the costs and disbursements of this action.
- 7. For such other and additional relief as the interests of justice may require.

# /s/ THOMAS R. EWALD

THOMAS R. EWALD 910 17th Street, N.W. Washington, D. C. 20006 (202) 452-8004

/s/ R. WYATT MICK, JR.

R. WYATT MICK, JR. 400 Lincoln Way East Mishawaka, Indiana 46544 (219) 255-9616

# Complaint

### /s/ JAMES J. OLSON

James J. Olson 122 South Mill Street Mishawaka, Indiana 46544 (219) 259-5461

#### /s/ JOHN M. RIGBY

JOHN M. RIGBY 26 North Third Street Niles, Michigan 49120 (606) 684-5400

# /8/ THEODORE L. BENDALL

THEODORE L. BENDALL 533 Warren Street Huntington, Indiana 46750 (219) 356-4100

# /s/ JAMES R. FLECK

James R. Fleck 111 West Market Street Columbia City, Indiana 46725 (219) 244-5129

# /s/ Edward A. Chapleau

Edward A. Chapleau
316 First Bank Building
133 South Main Street
South Bend, Indiana 46601
(219) 233-5173
Attorneys for Plaintiffs

Supreme Court, U. S. FILED

DEC 15 1977

MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA, et al.,

Respondents.

BRIEF AMICUS CURIAE OF CITY OF BATAVIA, CITY OF GENEVA, CITY OF NAPERVILLE, CITY OF ROCK FALLS, AND CITY OF ST. CHARLES, ILLINOIS IN OPPOSITION

CHARLES F. WHEATLEY, JR. FRANK W. FRISK, JR.

WHEATLEY & MILLER
1112 Watergate Office Building
2600 Virginia Avenue, N. W.
Washington, D.C. 20037

MARVIN G. GLINK

& MURPHY, P.C.
111 S. Washington Street
Chicago, Illinois 60602

December 15, 1977

TABLE OF CONTENTS	Page
STATEMENT OF INTEREST OF AMICUS CURIAE	1
REASONS FOR DENYING THE WRIT	3
I. The Federal Power Act Does Not Supersede The Federal Antitrust Laws	5
II. There Is No Implied Repeal Of The Federal Antitrust Laws Based On Other Precedents	12
III. The Petitioner Has Misconstrued The Cantor And Bates Cases In Seeking Immunity From The Federal Antitrust Laws Based On Filings With State Commissions	16
IV. The Remedies Enacted By Congress For Enforcement Of The Federal Antitrust Laws In The Public Interest By The District Courts Should Not Be Circumvented By Unilateral Rate Filings Of Utilities	23
V. The Court Below Properly Denied A Stay Of Anti-	
CONCLUSION	28
TABLE OF AUTHORITIES	
Federal Court Cases:	
Bates v. State of Arizona, U.S, 53 L.Ed. 2d 810 (1977)	7, 18, 19
California v. FPC, 369 U.S. 483 (1962)	
Cities of Batavia v. FPC, 584 F.2d 1056 (D.C. Cir. 1977)	2
Cantor v. Detroit Edison, 428 U.S. 579 (1976)	8, 19, 20
City of Cleveland v. FPC, 525 F.2d 845 (D.C. Cir. 1976	) 22
City of Huntingburg v. FPC, 498 F.2d 778 (D.C. Cir. 1974)	7

	Page
Federal Court Cases, continued:	
City of Shakopee v. Northern States Power Co. Civil No. 4-75-59-591 (D. Minn., October 19,	1976) . 9, 19
FPC v. Conway Corp., 426 U.S. 281 (1976)	3, 4, 8, 9, 10, 11, 22, 24, 25, 26, 27, 28
FPC v. Sierra Pacific Power Co., 350 U.S. 348 (	
FPC v. Southern California Edison Co., 376 U.S. (1964)	. 204
Georgia v. Pennsylvania R. Co., 325 U.S. 439 (1	
Gordon v. New York Stock Exchange, 422 U.S. (1975)	659
Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973)	7, 8, 13, 28
Lawlor v. National Screen Service Corp., 349 U. (1955)	
Local 189, Amalgamated Meat Cutters v. Jewel Co., 381 U.S. 676 (1965)	
Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (19	955) 23
Olympic Refining Co. v. Carter, 332 F.2d 260 (2nd Cir. 1964)	23
Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973)	2, 13, 16, 21, 28
Parker v. Brown, 317 U.S. 341 (1943)	16, 17, 18
Ricci v. Chicago Mercantile Exchange, 409 U.S. (1975)	289
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	
United Gas Pipe Line Co. v. Memphas Light, Ga. & Water Division, 358 U.S. 103 (1958)	
U.S. American Telephone & Telegraph Co., et al. Civ. No. 74-1698 (D. D.C., November 24, 19 Cert. denied, U.S, (November 28, 19	76);
II S n Fl Para Natural Car Co. 376 U.S. 651 (	

	Page
Federal Court Cases, continued:	
U.S. v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1957)	13, 15
U.S. v. Radio Corporation of America, 358 U.S. 334 (1959)	. 5, 8
Federal Power Commission (now the Federal Energy Regulatory Commission) Cases and Orders:	
FPC Order No. 487, 50 FPC 1973	25
Northern States Power Company, FPC Order Accepting Settlement Agreement and Setting Hearing, Docket No. ER76-818, May 23, 1977	10
Statutes:	
Clayton Act Section 2(a), 15 U.S.C. 13(a)	2
Section 202(b), 16 U.S.C. 824(a) (b) 6, 1 Section 204, 16 U.S.C. 824c	21, 24
nvestment Company Act, Section 22(f), 15 U.S.C. 80a-22(f)	15
Maloney Act, 15 U.S.C. 780-3	15
Natural Gas Act Section 7(c), 15 U.S.C. 717f Section 7(e), 15 U.S.C. 717c(e)	
Securities and Exchange Act Section 19(b), 15 U.S.C. 78s(b)	4, 15
Sherman Act Sections 1 and 2, 15 U.S.C. 1, 2	2
Miscellaneous:	
Welch F.X., Cases and Text on Public Utility	
Regulation Rev Ed (1968)	20

#### IN THE

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA, et al.,

Respondents.

BRIEF AMICUS CURIAE OF CITY OF BATAVIA, CITY OF GENEVA, CITY OF NAPERVILLE, CITY OF ROCK FALLS, AND CITY OF ST. CHARLES, ILLINOIS IN OPPOSITION

# STATEMENT OF INTEREST OF AMICUS CURIAE

The Cities of Batavia, Geneva, Naperville, Rock Falls, and St. Charles, Illinois are municipalities of the State of Illinois, (hereinafter referred to as "Illinois Municipals") which own and operate electric distribution systems serving the inhabitants of their communities. The Illinois Municipals purchase al! their electric power

requirements at wholesale from the Commonwealth Edison Company, which completely surrounds them and controls all transmission in the area. Since 1970, the Illinois Municipals have asserted to the Federal Power Commission that the Commonwealth Edison Company has discriminated against the Illinois Municipals under Section 205(b) of the Federal Power Act by unitaterally filing and putting into effect wholesale rate increases in excess of the prices at which the Company sells similar quantities of power to its large industrial customers. These matters are still pending before the Federal Power Commission.<sup>2</sup> The Illinois Municipals in 1976 filed a complaint in Federal District Court against Edison, alleging violation of the federal antitrust laws (§§1 and 2 of the Sherman Act and §2(a) of the Clayton Act) based, inter alia, upon the unilateral activities of Edison in imposing an anticompetitive price

squeeze upon the Illinois Municipals which threatens their very existence. The Illinois Municipals in the antitrust proceedings do not seek any relief or remedy conflicting in any way with the Commission's jurisdiction under §205(b) of the Federal Power Act, as construed by this Court's decision in Conway, infra, but seek to enforce their rights under the long-standing federal antitrust laws for an injunction or damages against Edison's continued anticompetitive activities. After Edison obtained a stay of the antitrust proceedings from the district court pending the outcome of the appeal by the present petitioner, Indiana and Michigan Electric Company, to the United States Court of Appeals for the Seventh Circuit, the Illinois Municipals filed a brief as amicus curiae before the court.<sup>3</sup> Since it is their understanding that Commonwealth Edison Company plans to file a brief with this Court as amicus curiae in support of Indiana & Michigan Electric Company's petition for a writ of certiorari, the Illinois Municipals herein file as amicus curiae in opposition to granting the writ.

The Illinois Municipals have received the consent of counsel for all parties to file this brief amicus curiae, in accordance with Rule 42 of this Court.

### REASONS FOR DENYING THE WRIT

The decision of the court of appeals below affirming the decision of the District Judge upholding the jurisdiction of the district court to consider asserted violations of the federal antitrust laws based on the

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act, Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 13, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission which, as an independent commission within the Department of Energy, was activated on October 1, 1977. For purposes of convenience, the designation "FPC" is used herein whenever it is intended to refer to either the Federal Power Commission or the Federal Energy Regulatory Commission.

<sup>&</sup>lt;sup>2</sup>In Cities of Batavia v. FPC, 584 F.2d 1056 (D.C. Cir. 1977), the court vacated an FPC order which had overturned an initial decision of a Presiding Administrative Law Judge finding Edison's action to have been unduly discriminatory in violation of §205(b) of the Federal Power Act. That remand as well as similar proceedings involving a subsequent unilateral wholesale rate filing by Edison in 1974 which increased the wholesale rates even higher vis-a-vis the Company's large industrial rates are now pending before the Commission.

<sup>&</sup>lt;sup>3</sup>The participation of the Illinois Municipals in the proceedin's below was recognized by the Court in its opinion (Pet. App. 28a-30a).

unilateral imposition of a price squeeze by an electric utility company upon its wholesale customers, is clearly correct and need not be reviewed at this time. The petitioner's projection of a conflict between the longstanding jurisdiction of the district courts to enforce the antitrust laws, and the different jurisdiction discussed in Conway under §205(b) of the Federal Power Act to consider discrimination, is hypothetical when and if any conflict between an antitrust decree and a final Commission decision under Conway should develop, that will be the proper time for its consideration by this Court. Petitioner's attempt to subvert this Court's Conway decision into a shield of immunity from any liability under the federal antitrust laws needs no review at the present time for the following reasons: (1) this Court has consistently held in a number of decisions that the Federal Power Act does not supersede the federal antitrust laws or immunize utilities from compliance with those laws; (2) the precedents based on other statutes urged by petitioner for an implied repeal of the Federal antitrust laws are inapplicable; (3) the efforts of petitioner to seek antitrust immunity based on its filings with state commissions are misplaced; (4) the separate antitrust relief available is in the public interest; and (5) the court below properly denied a stay of the antitrust proceedings.

I.

#### THE FEDERAL POWER ACT DOES NOT SUPERSEDE THE FEDERAL ANTITRUST LAWS.

This Court has never waivered in finding that the Federal Power Act does not set forth a pervasive scheme of regulation from which a jurisdictional electric utility could claim an implied immunity from the antitrust laws, or that there is a basis for exclusive or primary jurisdiction under the Federal Power Act which would require a district court to defer to the Federal Power Commission any matter which may be the subject of proceedings in both forums.

In Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) this Court specifically held that the Act was not a substitute for or offered immunization from the antitrust laws:

It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. See United States v. Radio Corporation of American, supra, at 351, 79 S. Ct. 457, 467. This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with "restraint of free and independent competition" among public utility holding companies.

Federal Power Commission v. Conway Corp., 427 U.S. 271 (1976).

Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations. 410 U.S. at 374, 375 (Emphasis added.)

With respect to the Otter Tail's refusal to deal, there is an express provision of the Federal Power Act, §202(b), 16 U.S.C. 824a(b), to provide wholesale service when necessary "in the public interest." The Court noted that the factors which would compel a §202(b) interconnection under the Act were based upon a decision as to whether the action was "necessary or appropriate in the public interest," and that this decision was wholly unrelated to antitrust considerations. 410 U.S. at 373.

Similarly, Sections 205(a) and 206(a) of the Federal Power Act, 16 U.S.C. 824d, 824e, endow the Commission with the jurisdiction to establish rates and charges, that are "just and reasonable," (a standard similar to the "necessary and appropriate standard" of §202(b)). Whereas the Commission's decision to compel (or not to compel) interconnection pursuant to Section 202(b) of the Act is to be based upon a decision as to whether the action is "necessary or appropriate in the public interest," and rates, in order to be adjudicated lawful by the FPC must be found to be "just and reasonable" pursuant to Sections 205(a) or 206(a) of the Act, the two situations are parallel since the Commission's decision in both instances is not governed by antitrust considerations. As the Court pointed out: "[a] Ithough antitrust considerations may be relevant, they are not determinative." 410 U.S. at 373 (Emphasis added.)

In a decision subsequent to Otter Tail, this Court considered the reciprocal situation of the responsibility of the FPC in administering the Federal Power Act to consider the principles of the antitrust laws. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973), held that the FPC must consider the potential anticompetitive consequences of a jurisdictional utility's proposed securities issue under §204, 16 U.S.C. 824c, of the Federal Power Act, making it quite clear that such a responsibility could in no sense be deemed to supersede or grant immunity from liability under the antitrust laws:

Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings. This is particularly significant in the context of a security issue under §204, for appropriate consideration at a preissue stage may avoid the need later to unravel complex transactions in granting relief under the antitrust laws or other sections of the Federal Power Act. 411 U.S. at 760 (Emphasis added). See also City of Huntingburg v. FPC, 498 F.2d 778 1783 (D.C. Cir. 1974).

In California v. Federal Power Commission, 369 U.S. 482 (1962), the FPC, pursuant to its authority under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f<sup>5</sup>

Since the Natural Gas Act "grew out of the same judicial history as did" Part II of the Federal Power Act, the Commission is endowed with basically the same powers in the electric utility industry as it is in the natural gas industry. In interpreting the reach of similar statutory provisions, the case law relating to the Power Act and the Gas Act are considered interchangeable. Federal Power Commission v. Southern California Edison Co., 376 U.S. 204, 211 (1964), FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

9

considered and approved a merger by stock acquisition, although an antitrust case filed by the Department of Justice was pending before a district court. This Court held that the Natural Gas Act did not supersede the federal antitrust laws, and a decision by the Commission could not immunize a party from antitrust actions in a district court:

Here, as in United States v. Radio Corp. of America, 358 U.S. 334, 3 L.Ed 2d 354, 79 S.Ct. 457, while "antitrust considerations" are relevant to the issue of "public interest, convenience and necessity" (id. 358 U.S. at 351), there is no "pervasive regulatory scheme" (ibid.) including the antitrust laws that has been entrusted to the Commission. 369 U.S. at 485.

This Court stated that its function "is to see that the policy entrusted to the courts is not frustrated by an administrative agency,...lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission." 369 U.S. at 490; see also United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

Thus, on the basis of Otter Tail, Gulf States, and California v. Federal Power Commission, the court of appeals in this case was correct in concluding that the Commission does not have exclusive jurisdiction over price squeezes: "Since the antitrust laws are not generically superseded by the regulation of electric Utilities..." (Pet. App. 19a).

It is quite clear that this Court in its Conway<sup>6</sup> decision did not intend to overrule or change sub

silentio its long line of cases affirming no supersedure of the federal antitrust laws by the Federal Power Act. This Court's decision in Conway which set the remedial limits for discrimination under §205(b) of the Federal Power Act within a "zone of reasonableness" shows clearly that there is no plain repugnancy between the Federal Power Act and the antitrust laws. Discrimination can result from filings made by electric utilities before both the FPC and state commissions. In Conway it was properly noted that the Commission's jurisdiction is limited to wholesale rates. Although the FPC may look at retail rates in evaluating price squeezes, its power to remedy them is restricted to an adjustment of the wholesale rate. Thus, any antitrust violation based upon a price squeeze is clearly outside the remedial scope of the Federal Power Act, as this Court demonstrated in Conway, and there can be no repugnacy between the Act and the antitrust laws.

In the Shakopee case, City of Shakopee v. Northern States Power Co., Civil No. 4-75-59-591 (D. Minn., October 19, 1976), cited by the court of appeals, Judge Lord similarly held that there is no repugnancy between the antitrust laws and regulation of electric utilities when price squeeze violations are at issue:

As in Shakopee, the price squeeze alleged in our case is not between rates set by one regulatory agency as was the case in Georgia v. Pennsylvania R. Co., 324 U.S. 439, but rather is between the 'wholesale' rate set by FPC and the 'retail' rate over which the FPC has no jurisdiction. Put simply, under these circumstances, antitrust immunity is not 'necessary' to the functioning of the regulatory process because the discrimination is 'external' to that process. The FPC does not control both ends of the discriminatory conduct.' (Pet. App. 20a).

<sup>&</sup>lt;sup>6</sup> Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976).

Also cited by the court of appeals was a Federal Power Commission order issued on May 23, 1977 in Northern States Power Company, FPC Docket No. ER76-818, in which the Commission held that it did not have exclusive jurisdiction over price squeeze matters, concluding that "there is no alternative to this issue being litigated in both forums, one concerning itself with present rates and the other with past rates and possible future conduct." (Pet. App. 21a) The Commission went on to hold that should a price squeeze plaintiff "prove itself entitled to relief the regulatory process would not be disturbed by an award of damages for past conduct nor by an enjoining of certain future conduct." Id.

The court of appeals noted that petitioner was fully aware of the fact that the Commission has limited remedial power over price squeezes (Pet. App. 25a). In its petition to this Court petitioner again concedes that FPC cannot provide a complete price squeeze remedy: "The Court of Appeals decision below rests heavily upon FPC's inability fully to alleviate a price squeeze between the wholesale and retail price structures, irrespective of the zone of reasonableness for wholesale rates." (Pet. 19). However, the court of appeals did not, as petitioner suggests (Pet. 13), hold that the remedial limitations of the Act as set forth by this Court in Conway would be exceeded, and it stated this clearly and unequivocally:

Nor does Conway guarantee that the price squeeze may be fully remedied by severely depressing wholesale rates to eliminate the price squeeze. This is because, as we have demonstrated above, the Federal Power Commission cannot set wholesale rates below the lower boundary of the

zone of reasonableness even if the price squeeze could not be eliminated without setting the wholesale price below the zone of reasonableness (Pet. App. 25a, 26a).

Petitioner's concern that the court of appeals decision would lead to confiscatory wholesale rates beyond the limitation set in Conway is simply not well-founded. In any event, it is premature to speculate what the effect of a district court remedy would be if it found that there was a price squeeze. There is no present conflict, or even the possibility of such a conflict, so there can be no "present concrete case or controversy concerning it."

This Court in Otter Tail stated the well-established rule of construction applied to cases where implied immunity is at issue:

"Repeal of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." (Citations omitted) 410 U.S. at 372.

Totter Tail, supra, 410 U.S. at 377. In Otter Tail this Court stated that: "The decree of the District Court has an open end by which that court retains jurisdiction 'necessary or appropriate' to carry out the decree or for 'future modification of any of the provisions.' It also contemplates that future disputes over interconnections and the terms and conditions governing those interconnections will be subject to Federal Power Commission perusal. It will be time enough to consider whether the antitrust remedy may override the power of the Commission under Section 202(b) as, if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it." 410 U.S. at 376, 377. Unlike the Otter Tail situation, no district court has determined that a price squeeze exists in this case, so the question of any remedy is even more remote.

In holding that there is no plain repugnancy between the antitrust laws and Section 202(b) of the Federal Power Act, this Court noted that the Commission had been given only partial authority to order interconnections, instead of full authority to order wheeling of power over transmission lines. The same situation arises in this case. Under the rate filing and approval sections of the Act the Commission has been given only partial authority to remedy a price squeeze, instead of the full authority which could have been vested in it by Congress.

Petitioners have not set forth any reasons why this case is any different from Otter Tail, or demonstrated that there is a plain repugnancy between the Federal Power Act and the antitrust laws which would call into play an implied immunity, a finding that is strongly disfavored.

11.

# THERE IS NO IMPLIED REPEAL OF THE FEDERAL ANTITRUST LAWS BASED ON OTHER PRECEDENTS.

Rather than setting forth any reason why this Court should abandon its well-established holdings that the Federal Power Act does not set forth a pervasive scheme of regulation from which an implied immunity from antitrust laws can be derived, petitioner argues that that principles of implied repeal in Silver v. New York Stock Exchange, 373 U.S. 341 (1963), Gordon v. New York Stock Exchange, 422 U.S. 659 (1975), and United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975) should apply to this case (Pet. 16-20). Illinois Municipals submit that these arguments are not supportive of a grant of certiorari for several reasons.

Petitioner states that a Petition for Writ of Certiorari pending before this Court in American Telephone & Telegraph Co. v. United States, Docket No. 77-372, "raises similar issues arising under different procedural circumstances." (Pet. 16 n. 12). This Court denied the AT&T petition on November 28, 1977. Petitioner is attempting to apply law developed under other statutory provisions unrelated to the Federal Power Act. The proper approach to an implied immunity issue was stated by the district court in the AT&T case:

When faced with implied immunity questions, the courts have undertaken a case-by-case approach which analyzes the particular industry, the applicable regulatory scheme and procedures, and the statutory history to determine whether operation of the antitrust laws can be reconciled with the regulatory scheme. United States v. American Telephone & Telegraph Co. et al. Civ. No. 74-1698 (D.D.C., November 24, 1976).

This Court has followed this approach in Otter Tail, Gulf States, and California v. Federal Power Commission. It is not necessary to undertake the task again.

The trilogy of cases relied upon by petitioner has no relevance to reconciliation of regulation and antitrust law coverage in the electric industry. Silver, Gordon, and National Association of Securities Dealers were all decisions concerning the question of implied immunity under statutes administered by the Securities and Exchange Commission. In Silver this Court, holding that the Exchange Act did not provide an implied repeal of the antitrust laws, left the door open whereby a "different case" would arise if there had been SEC jurisdiction and judicial review of a "particular exchange ruling, as there is under the 1938 Maloney

Act amendments to the Exchange Act to examine disciplinary action by a registered securities association." 373 U.S. at 358 n. 12. In contrast, this Court has never left the door open for a "different case" to arise under the Federal Power Act. Petitioner is attempting to fit the round peg of SEC regulation into the square hole of FPC regulation. In light of the consistent holdings by this Court that there is no implied immunity under the Federal Power Act, it just will not fit. The court of appeals, as will be explained below, was correct when it stated:

In order to imply a general exemption for an economic sector of an industry, mere conflicting standards are not enough. This aspect of a regulatory agency's jurisdiction must be "imperative in the continuing effective functioning" of the regulatory scheme over the industry as a whole. Cantor, supra, at 596-597 n. 36 and n. 37. Since Cantor distinguished and refused to apply Gordon v. New York Stock Exchange, 422 U.S. 659, perhaps defendant's principal case on this ground, no purpose would be served in discussing it further here. See 428 U.S. at 596-597 n. 36. (Pet. App. 19a n. 8)

Gordon has no application to the case at bar. This Court reconciled the operation of the antitrust laws with the regulatory scheme set forth in Section 19(b) (15 U.S.C. 78s(b)) of the Securities and Exchange Act of 1934, which is not comparable to any Federal Power Act provision. Section 19(b) vests the SEC with specific review power over the fixing of commission rates, and this Court noted that the SEC had exercised its supervisory power since 1958 by conducting detailed studies, and regulating this area very stringently. 422 U.S. at 668-77. For a rate to become effective under

section 19(b). In stark contrast to this procedure is Section 205 of the Federal Power Act. (16 U.S.C. 824d.) A rate filed with the FPC becomes effective within five months, whether it has been approved by FPC or not, regardless of whether or not it meets the "just and reasonable" standards of the Act. The scheme set forth in Section 205 leaves the FPC without power to prevent the rate from becoming effective, and is clearly not analogous to the situation in Gordon wherein a commission rate cannot become effective until the SEC has taken positive action by approving it.

Silver is supportive of the opinion of the court of appeals in this case. As is the case with the Federal Power Act, the Securities Exchange Act of 1934 contains no express exemption from the antitrust laws, and this Court held that in the absence of regulatory supervision over the application of exchange rules, an immunity from the antitrust laws could not be implied.

National Association of Securities Dealers involved Section 22(f) (15 U.S.C. 80a-22f) of the Investment Company Act, under which certain restrictive agreements in the sale of securities were authorized by Congress. When read in conjunction with the Maloney Act, (15 U.S.C. 78o-3), which provided a method of self-regulation by brokers and dealers, it was held that Congress had invested the SEC with such pervasive authority that implied immunity from the antitrust laws was necessary to make the regulatory scheme work. This holding has no relationship to the instant case. The Federal Power Act contains no provisions comparable to Section 22(f) of the Investment Company Act or the Maloney Act.

The court of appeals was correct in its approach to the issue of implied immunity when it analyzed the Federal Power Act, not the Securities and Exchange Act, in light of this Court's well-established holdings that, under the terms of the Federal Power Act and its legislative history, Congress did not immunize or relieve private power companies from the antitrust laws. Petitioner's reliance upon Gordon is misplaced, and flies in the fact of the statement of this Court in Cantor v. Detroit Edison, 428 U.S. 579 (1976): "Indeed, since our decision in Otter Tail Power Co. v. United States, . . . there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." 428 U.S. at 596, n. 35.

III.

THE PETITIONER HAS MISCONSTRUED THE CANTOR AND BATES CASES IN SEEKING IMMUNITY FROM THE FEDERAL ANTITRUST LAWS BASED ON FILINGS WITH STATE COMMISSIONS.

Petitioner argues that the court of appeals has misconstrued Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), in light of this Court's recent decision in Bates v. State of Arizona, \_\_\_\_\_ U.S. \_\_\_\_, 53 L.Ed. 2d 810 (1977), which barred an antitrust claim under the rule of Parker v. Brown, 317 U.S. 341 (1943). (Pet. 20-23) In Parker an antitrust suit was brought against officials of the State of California which challenged state programs designed to maintain prices in the raisin market, thereby restricting competition. It was held that the State, "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352. This Court refused in Cantor to apply the Parker exception from

the antitrust laws in a situation where the defendant electric utility was furnishing light bulbs free of charge under the terms of a tariff filed with the state regulatory commission.

Cantor removed any doubts about state regulatory approvals immunizing electric utilities from the antitrust laws:

This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law. 428 U.S. at 600.

The activity challenged in Bates (Rules imposed by the Arizona Supreme Court and enforcement of a disciplinary rule restricting advertising by attorneys) was distinguished from the Cantor situation because the "restraint is the affirmative command of the Arizona Supreme Court..." and is "compelled by direction of the State acting as a sovereign." 53 L.Ed. 2d at 821, citing Parker, 421 U.S. at 791. This Court also noted that: "We believe, however, that the context in which Cantor arose is critical. First, and most obviously, Cantor would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State." Id.

The court of appeals' opinion in this case is in complete accord with this Court's treatment of Cantor in Bates:

As in Cantor, the plaintiff municipalities have named no state officials or state agencies in the complaint, and there is no claim that any state action violated the antitrust laws. See 428 U.S. at 591-592. Thus under the plurality opinion, Parker

v. Brown does not even arguably apply to the facts of our case. Nor do Chief Justice Burger or Justice Blackmun's concurrence in Cantor give defendant solace. The challenged activity here is a dual rate structure. The state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant. The price squeeze has not been blessed by Indiana or Michigan. The fact that the district court has no authority to maintain a direct attack on the defendant's retail rates does not alter the reality that the state commissions have in no way placed a badge of approval on the defendant's dual rate structure. Consequently, defendant's conduct is not immunized under Parker v. Brown (Pet. App. 17a).

In Bates, this Court also noted that in Cantor "the State had no independent regulatory interest in the market for light bulbs." 53 L.Ed. at 822. The court of appeals in this case noted that: "The state commissions of Indiana and Michigan are not alleged to have any power to regulate the price squeeze in any sense. Since this conduct is not being regulated by the state commissions, Sherman Act jurisdiction of course is not ousted in favor of state regulations. The defendant does not contend otherwise." (Pet. App. 18a n. 7).

The final distinguishing point made by this Court in Bates was that "the light bulb program in Cantor was instigated by the utility with only the acquiescence of the state regulatory commission. The State's incorporation of the program into the tariff reflected its conclusion that the utility was authorized to employ the practice if it so desired." 53 L.Ed. at 823. In contrast, the rules restricting advertising "reflect a clear articulation of the State's policy with regard to professional behavior." Id. Again, the decision of the

court of appeals in this case is in accord with the holding in *Bates* and *Cantor* when it cited Judge Lord's finding in *Shakopee* that

"if an anticompetitive practice is the product, at least in part, of the company being regulated and could be avoided if the company chose to do so, then the anticompetitive condition is in reality the work of that company and is not 'necessary' to the functioning of the regulatory scheme and will not be immunized from antitrust liability." (Pet. App. 19a)

At both the retail and wholesale levels, the initiative in setting rates comes from the utility, and is the "product" of a management decision, not the regulatory agency. It is this conduct which has created the unlawful "price squeeze" under which Illinois Municipals are suffering.

The fact that a state commission approves rates does not immunize a utility from federal antitrust law coverage, as this Court held in *Cantor*:

The case before us also discloses a program which is the product of a decision in which both the respondent and the Commission participated. Respondent could not maintain the lamp exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's. 428 U.S. at 593, 594. (Emphasis added.)

The entire procedure is started by a management determination that a rate change should be filed, after which the commission's power of review comes into play. This procedure is typical of regulatory commissions generally.<sup>8</sup>

Cantor made it clear that, even under pervasive state regulation, where a lightbulb exchange program or anticompetitive rates could be challenged, the federal antitrust laws apply to electric utilities subject to such regulation:

Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrainted competition. Agricultural marketing programs, such as that involved in Parker, were of that character. But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from experitation. There is no logical inconsistency between requiring such a firm to

meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy. 428 U.S. at 595, 596.

And, in a footnote to the above language, Justice Stevens noted:

Indeed, since our decision in Otter Tail Power Co. v. United States,... there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities. 428 U.S. at 596, n. 35.

The Indiana and Michigan statutory provisions cited by petitioners concerning the regulation of electric utilities (Pet. 22) are typical examples of state statutes which require action on behalf of the utility before rate changes are approved.

Rate increase filings made by public utilities with the Federal Power Commission are also the result of a management decision, not as a result of FPC initiative. Section 205(e) of the Federal Power Act constitutes nothing more than a statutory limitation on a utility's otherwise unqualified right to unilaterally increase rates. In discussing the provisions of the Natural Gas Act, 10 this Court in *United Gas Pipe Line Company v.* 

<sup>&</sup>lt;sup>8</sup>Professor Welch has described the procedure, and the reasons for it, as follows:

<sup>&</sup>quot;The normal procedure in the case of a utility seeking a rate increase is for the utility to file proposed tariffs which, in effect, spell out the changes which the utility company wishes to make."

<sup>&</sup>quot;The reason why the regulatory authority works this way, through the utility company's own rate-fixing machinery, is obvious. The utility company management is better able, by experience and knowledge, to determine just how much revenue is likely to be produced by various rate changes in each class of service. In other words, the management is more familiar with the details of its own business operation than the regulatory authority, and can best judge, in the first instance, at least, what degree of changes will be needed to bring about a given result in the operating revenues." (Welch, F.X., Cases and Text on Public Utility Regulation, 515-517, Rev. Ed. (1968)).

<sup>&</sup>lt;sup>9</sup>Justice Stewart, speaking for the dissent in Otter Tail, also noted that: "The Commission does not normally set rates, though utilities subject to its jurisdiction must file proposed rate schedules with it, and it has the opportunity of assessing the lawfulness of those rates." 410 U.S. at 390 n. 7.

<sup>&</sup>lt;sup>10</sup> Filing provisions of the Natural Gas Act, 15 U.S.C. 717c(e), are virtually identical to Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e).

Memphis Light, Gas and Water Division, 358 U.S. 103, 113 (1958), stated:

United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so.

The U.S. Court of Appeals for the District of Columbia, in City of Cleveland, Ohio v. FPC, 525 F.2d 845, 855 (D.C. Cir. 1976), restated the well-established scope of the rate filing procedures under the Federal Power Act, when it said:

The legislation effectuates a congressional scheme under which electric utilities establish initially, by contract or otherwise, the rates they will charge, subject to revision by the Commission on a finding of unlawfulness. To be sure, the utility may, without negotiation or consultation with anyone, set the rates it will charge prospective customers, and change them at will, so long as they have not been set aside by the Commission on grounds of inconsistency with the Act.

This Court in Conway recited with approval the language of the District of Columbia Court of Appeals, which referred to . . . "the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers. 167 U.S. App. D.C., at 53, 510 F.2d at 1274. (Footnote omitted.)" 426 U.S. at 279. (Emphasis added).

Thus, it is clear that price squeezes created by the conduct of regulated electric utilities are not immune from the antitrust laws under *Parker v. Brown*, as held by the court of appeals in this case.

IV.

THE REMEDIES ENACTED BY CONGRESS FOR EN-FORCEMENT OF THE FEDERAL ANTITRUST LAWS IN THE PUBLIC INTEREST BY THE DISTRICT COURTS SHOULD NOT BE CIRCUMVENTED BY UNILATERAL RATE FILINGS OF UTILITIES.

Petitioner's argument to the effect that the decision by the court of appeals in this case "encourages the practice of dual proceedings, administrative and judicial, and requires the federal courts to hear and determine the same issues that are being heard and determined by FPC," (Pet. 12) is misleading and erroneous.

As this Court has consistently held, Congress did not vest FPC with pervasive authority to give complete relief from antitrust violations. It is Congress, not the court of appeals, which determines the forum in which antitrust violations engaged in by regulated electric utilities may be remedied. Wholesale customers, such as Illinois Municipals, by filing antitrust suits against price squeezes are upholding the public interest in the maintenance of competition within the electric industry. Such action is in accord with this Court's statements that: "Private treble-damage actions are an important component of the public interest in 'vigilant enforcement of the antitrust laws." "11 For "Congress has expressed its belief that private antitrust litigation is one of the surest methods for effective enforcement of the antitrust laws,"12

<sup>&</sup>lt;sup>11</sup>Olympic Refining Company v. Carter, 332 F.2d 260, 264 (end Cir. 1964), quoting from Lawlor v. National Screen Service Corp., 349 U.S. 322, 329 (1955).

<sup>&</sup>lt;sup>12</sup>Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1955).

The number of cases involving price squeeze issues with which the district courts will have to deal is solely determined by the conduct of electric utilities who engage in pricing activity which cannot be remedied fully by the FPC. When such anticompetitive activity stops, so will the necessity to seek price squeeze remedies before both the Commission and the courts. Attempts by petitioner to halt and supersede this remedy now available to small wholesale customers should be directed to Congress, not this Court.

V.

# THE COURT BELOW PROPERLY DENIED A STAY OF ANTITRUST PROCEEDINGS.

The court of appeals correctly interpreted the limitations placed upon the Federal Power Commission in providing a complete remedy for price squeeze violations, both under the filing provisions of the Federal Power Act, and this Court's unanimous decision in Federal Power Commission v. Conway Corp., supra. In finding that the district court did not abuse its discretion in denying a stay until the Commission acted, the court of appeals noted that "... the equities weigh heavily in favor of the plaintiff municipalities." (Pet. App. 28a). The reasons the equities favor the price squeeze plaintiff are found in the Act itself, as the court noted:

The Illinois Municipals point out that the district court should be permitted to proceed in order to avoid the typical lengthy delays that occur in processing wholesale rate increases under Section 205 of the Federal Power Act (16 U.S.C. §824d). Under that provision, a public utility files its rate

increase application no less than 30 days before the effective date thereof, and the Commission typically suspends the proposed rate from one day to five months, with refunds required if the rate is found to be above the statutory "just and reasonable" standard. The wholesale rate increase in the present case stems from a June 13, 1972, application by defendant, and the case was not terminated in the Commission until it approved a settlement on June 1, 1977, a span of five years. Except for the settlement, the case would still pend before the Commission.

Thus far, the Commission has never rejected a rate filing on price squeeze or other antitrust grounds, and there is no limit on the number of filed increases that may be in effect at the same time under Section 205. Simply by filing an anti-competitive increase and waiting for time to pass, a public utility like defendant can place a price squeeze on wholesale customers. As the Commission has stated, "electric utilities are permitted to file virtually any level of costs and rates and after a period of suspension charge those rates subject to refund, pending Commission decision." FPC Order No. 487, 50 FPC at 127 (1973) (Pet. App. 28a, 29a).

This Court in Conway approved the remedy adopted by the court of appeals which placed a responsibility on the Commission to cure "price squeezes," which result from rate increases filed under Section 205 of the Act. The Court stated:

When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a squeeze between themselves. There would, at the

very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers. 167 U.S. App. D.C. at 53; 510 F.2d at 1274. (Footnote omitted). 426 U.S. at 279.

The Conway remedy, however, does not become effective until a final order has been issued by the Commission. The price squeeze period between the Commission allowing the rates to go into effect and its final order is not under the protective umbrella of Conway.

If the primary jurisdiction theory advocated by petitioner was adopted, wholesale customers would be subjected to harmful delays before they had an opportunity under the antitrust laws to remedy price squeeze problems created as a result of a rate filing. 

Until the Commission finally acted, the customer would merely have to wait and suffer.

As the court of appeals below noted:

Thus if a stay were granted to defendant, plaintiffs and customers in similar positions would be unable to secure any relief from price squeeze like this until the Commission finally approved the filed rates. As the Illinois Municipals have picturesquely put it:

"Delay, combined with the multiple rate increases, could mean that the customer has

been put out of business by his supplier-competitor. You cannot give refunds to a corpse." (Br. 27-28.)

Furthermore, the Commission would be unable to afford complete relief because the Federal Power Act does not provide for damages or for an injunction against a utility violating the antitrust laws. Thus a stay in this case would excuse defendant's alleged non-compliance with the antitrust laws for a completely unnecessary length of time (Pet. App. 29a, 30a).

Furthermore, FPC relief is not complete, as the Federal Power Act contains no provisions for an award of damages or for an injunction against an electric company engaging in violations of the antitrust laws. FPC's authority is limited to ex post facto review of unilateral rate increase filings. The doctrine of primary jurisdiction does not require a district court to defer to the Commission in such a situation, as noted by the court of appeals in this case:

Nor does Conway guarantee that the price squeeze may be fully remedied by severely depressing wholesale rates to eliminate the price squeeze. This is because, as we have demonstrated above, the Federal Power Commission cannot set wholesale rates below the lower boundary of the zone of reasonableness even if the price squeeze could not be eliminated without setting the wholesale price below the zone of reasonableness limit. Primary jurisdiction is not a doctrine that requires an exercise in futility. See Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 686. Thus antitrust relief is needed for full protection from the anticompetitive conduct alleged in the complaint. (Pet. App. 25a, 26a).

<sup>&</sup>lt;sup>15</sup>Illinois Municipals are essentially captive customers of Commonwealth Edison, and have no feasible alternative source of power supply.

#### CONCLUSION

The attempt by petitioner to somehow read into this Court's Conway decision a sub silentio reversal of its long line of decisions including Otter Tail, Gulf States and California, which consistently held that Congress in enacting the Federal Power Act did not intend to supersede the federal antitrust laws, was properly rejected by the court of appeals and district court below. There is no reason now to consider the matter further. The petitioner's attempt to postulate a conflict between the Commission's exercise of its jurisdiction under Conway and the exercise of antitrust jurisdiction by the district courts is clearly conjectural and premature. Should any such conflict arise, that would be the time to review the matter based on a specific case or controversy. In the meantime, the expeditious

exercise by both the Commission and the courts of their respective jurisdictional remedies appears warranted in furtherance of the public interest as set forth by Congress in the complementary statutory programs.

Respectfully submitted,

CHARLES F. WHEATLEY, JR. FRANK W. FRISK, JR.

WHEATLEY & MILLER
1112 Watergate Office
Building
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

MARVIN G. GLINK
ANCEL, GLINK DIAMOND &
MURPHY, P.C.
111 W. Washington Street
Chicago, Illinois 60602

Attorneys for Cities of Batavia, et al., Amicus Curiae

December 15, 1977

IN THE

DEC 17 1977

### Supreme Court of the United States RODAK, JR., CLERK

OCTOBER TERM, 1977.

#### No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY.

Petitioner.

VS.

CITY OF MISHAWAKA, INDIANA, CITY OF NILES, MICHIGAN. CITY OF COLUMBIA CITY, INDIANA, CITY OF BLUFFTON, INDIANA, CITY OF GARRETT, INDIANA. CITY OF GAS CITY, INDIANA, TOWN OF FRANKTON, INDIANA, TOWN OF WARREN, INDIANA, TOWN OF NEW CARLISLE, INDIANA, AND TOWN OF AVILLA, INDIANA. MUNICIPAL CORPORATIONS.

Respondents.

#### BRIEF AMICUS CURIAE OF COMMONWEALTH EDISON COMPANY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

RICHARD G. FERGUSON. HARLAN M. DELLSY. 1 First National Plaza. Chicago, Illinois 60603, (312) 786-7500, Counsel for Amicus Curiae.

Of Counsel:

RICHARD E. POWELL, LAWRENCE D. LASKY. ISHAM, LINCOLN AND BEALE.

December 16, 1977.

### INDEX.

		PA	GE
Inter	est of	the Amicus	1
Argu	ment		3
1	Ext	Writ of Certiorari Should Issue to Clarify the ent to Which Conduct Expressly Mandated by ministrative Agencies Can Give Rise to Antitrust bility	3
П		e and Federal Administrative Agencies Have mary Jurisdiction Over Utility Rates	5
	A.	The Decision Below Improperly Encroaches on the Rate-making Authority of Regulatory Agencies	5
	В.	The Decision Below Fails to Recognize That the Regulation of Rates Is at the Core of Administrative Regulation of Utilities	6
•	C.	The Court of Appeals Failed to Recognize the Administrative Expertise Required to Establish Utility Rates	. 7
	D.	Courts Should Not Re-examine Rates Estab- lished by Regulatory Agencies	8

#### TABLE OF AUTHORITIES.

#### Cases.

American Telephone & Telegraph Co. v. United States,	
Supreme Court Dkt.77-372	4
Bates v. State Bar of Arizona,	7
Bluefield Water Works & Improvements Co. v. Public Service Comm., 362 U. S. 679 (1923)	6
Cantor v. Detroit Edison Co., 428 U. S. 579 (1976) 4,	7,9
Federal Power Commission v. Conway Corp., 426 U. S. 271 (1976)	8, 9
Federal Power Commission v. The Hope Natural Gas Co., 320 U. S. 591 (1944)	7, 8
Federal Power Commission v. Southern California Edison Co., 376 U. S. 205 (1964)	6
Georgia v. Pennsylvania RR Co., 324 U. S. 439 (1945)	5
Munn v. Illinois, 94 U. S. 113 (1877)	6
Otter Tail Power Co. v. United States, 410 U. S. 366 (1973)	4, 9
Public Utilities Commission v. Attleboro Steam and Electric	
Co., 273 U. S. 83 (1927)	6
Statute.	
Federal Power Act, § 205, 16 U. S. C. 824d	6
Other Authorities.	
Bonbright, Principles of Public Utility Rates (Columbia,	
1960)	8
Davis, Administrative Law Treatise (West, 1958)	8

#### IN THE

### Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-689.

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

vs.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
MUNICIPAL CORPORATIONS,

Respondents.

# BRIEF AMICUS CURIAE OF COMMONWEALTH EDISON COMPANY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

#### INTEREST OF THE AMICUS.

Commonwealth Edison Company ("Edison") is a public utility which provides electric service to the northern portion of the State of Illinois. Like the Petitioner here, Edison is the defendant in a treble-damage antitrust action which is currently

pending in the United States District Court for the Northern District of Illinois (City of Batavia v. Commonwealth Edison Company, No. 76 C 4388). The plaintiffs are certain of Edison's wholesale electric customers. The principal issue in Edison's case is the level of Edison's wholesale rate for electric service, an issue which is also pending before the Federal Energy Regulatory Commission ("FERC") in a ratemaking proceeding (FERC Docket E-9002). Many of the factual and legal issues in Edison's case are quite similar to those in the case now before this Court. A number of other antitrust cases involving electric utility rates which are pending before district courts while rate cases are simultaneously pending before the FERC (See the Petition in this Matter at p. 11) also involve similar issues. Because Edison's case is pending before a District Court within the Seventh Circuit, however, the decision of that Court of Appeals has had a direct impact on the rulings of the District Court hearing Edison's case. The effect on Edison of the Court of Appeals' decision can only be alleviated if this Court grants the writ of certiorari requested by Indiana & Michigan Electric Company.

#### ARGUMENT.

I.

A WRIT OF CERTIORARI SHOULD ISSUE TO CLARIFY THE EXTENT TO WHICH CONDUCT EXPRESSLY MANDATED BY ADMINISTRATIVE AGENCIES CAN GIVE RISE TO ANTITRUST LIABILITY.

The Court of Appeals has held that a public utility can be liable to its customers under the antitrust laws for treble damages claimed to result from differences between the levels of two of the utility's rates even though one rate had been ordered into effect by a federal regulatory agency and the other rate had been ordered into effect by a state regulatory agency. In so doing, the Court below did not consider the differing policies which underlie the regulatory and antitrust laws.

The application of the antitrust laws to a regulated industry inevitably requires that a resolution be made among the demands of competing legal and social policies. The antitrust laws are designed to further the competitive processes of the market place. The establishment of a regulatory commission, on the other hand, reflects a legislative decision that unlimited competition would be wasteful of society's resources, or that unlimited competition is impractical because of the existence of conditions giving rise to a natural monopoly.

The conflict between regulation and the antitrust laws is sharpest when a private litigant seeks treble damages for injuries claimed to arise from conduct expressly mandated by a regulatory commission. The present case is the first to reach this Court in which conduct by a utility which has been ordered by agencies acting under the Federal Power Act and under state public utility laws is claimed to give rise to treble damage antitrust liability.

The significance of this case does not lie in the fact that it involves the application of the antitrust laws to the electric utility industry. It is quite clear from prior decisions of this Court that electric utilities are subject to the antitrust laws.1 Otter Tail Power Co. v. United States, 410 U. S. 366 (1973). This case is significant because it involves an attempt to apply the antitrust laws to a situation which has resulted from active. but differing, regulation by federal and state agencies. This case, and the many others like it now pending across the country, involve complaints which call upon the district courts to compare utility rates established by a federal agency against rates established by state regulatory agencies and to render a verdict on their relative propriety. In these cases, for the first time, courts are being called upon to specify the extent to which an electric utility which charges its customers rates established by federal and state regulatory agencies can thereby incur treble damage liability to those customers under the antitrust laws.

The issues raised in this case are not resolved by the Court's opinion in Cantor v. Detroit Edison Co., 428 U. S. 579 (1976). That case dealt with conduct, the sale of light bulbs, peripheral to the State's interest in utility regulation. This case involves the level of rates, a matter at the core of both state and federal regulation of electric utilities. The decision in Federal Power Commission v. Conway Corp., 426 U. S. 271 (1976), is likewise in no way dispositive of this matter. In ordering the FPC to consider possible anticompetitive effects in establishing rates the Court in Conway was dealing only with the scope of the FPC's obligations under the Federal Power Act. Potential conflicts between regulatory and antitrust jurisdiction were not considered in that case.

We respectfully submit that the manner in which such conflicts should be resolved is a matter deserving the substantive attention of this Court. II.

### STATE AND FEDERAL ADMINISTRATIVE AGENCIES HAVE PRIMARY JURISDICTION OVER UTILITY RATES.

#### A. The Decision Below Improperly Encroaches on the Ratemaking Authority of Regulatory Agencies.

The opinion below recognizes that the authority to establish rates for electric utility service has been vested in administrative agencies of both the States and the federal government. The opinion below also recognizes that the district courts have neither the authority nor the technical expertise to determine the level of utility rates. Having assumed these principles, however, the Court of Appeals went on to hold that a district court could grant a plaintiff damages on the ground that the plaintiff had been paying too high an electric rate (App. p. 26a).1 The Court of Appeals also held that a district court could order a utility to file a rate schedule in the form specified by the court (App. p. 27a). According to the Court of Appeals, such actions by a district court would not be an interference with the ratemaking process (App. pp. 25a, 26a). Obviously, however, an award of damages is economically equivalent to a rebate, a refund, or any other means of retroactively lowering a utility rate, Georgia v. Pennsylvania RR. Co., 324 U. S. 439 (1945). Similarly, an injunction directing a utility to file rates of a specified form and level after different rates have been mandated by an administrative agency is a clear interference with the agency's jurisdiction and an attack upon the agency's actions. The fact that the Court's order might issue in response to a private antitrust complaint would not alter its effect as an otherwise prohibited collateral attack on an agency decision.

The practical effect of the decision below is to ignore the legislative declaration that rates be established by administra-

<sup>1.</sup> In this regard, the Petition now before the Court differs materially from that recently denied in American Telephone & Telegraph Co. v. United States, Docket No. 77-372.

<sup>1.</sup> References to "App. ......" are to the Appendix to the Petition for a Writ of Certiorari in this case.

tive agencies with particular expertise in ratemaking. Instead, the Court of Appeals would apply the antitrust laws to ratemaking in a manner which would give the courts effective control over the level of all utility rates. In reaching this decision, the Court of Appeals erred twice. It failed to recognize that the establishment of rates by administrative agencies is central to the legislative scheme of utility regulation, and it failed to give due regard to the expertise of administrative agencies in the complex area of ratemaking. Either of these errors would be sufficient to require a reversal of the decision below.

#### B. The Decision Below Fails to Recognize That the Regulation of Rates Is at the Core of Administrative Regulation of Utilities.

The decision below is based on the express belief that agency ratemaking is not a central aspect of the regulation of public utilities and that a district court accordingly need not defer to regulatory jurisdiction (App. pp. 16a, 17a, 27a). This belief is clearly erroneous. The establishment of utility rates has long been accepted as a fundamental part of the regulation of public utilities by government, Munn v. Illinois, 94 U. S. 113 (1877). It is axiomatic that a utility is prohibited from charging rates different from those ordered by a regulatory body. See, e.g., § 205 of the Federal Power Act, 16 U. S. C. 824d. Federal regulation of the wholesale electric business came principally to fill the "gap" in state ratemaking authority perceived after the decision in Public Utilities Commission w Attleboro Steam and Electric Co., 273 U. S. 83 (1927). See Federal Power Commission v. Southern California Edison Co., 376 U. S. 205 (1964). Because ratemaking is a complex and specialized task, Congress and the legislatures of the States have generally delegated this function to administrative bodies, but the actions of those bodies have the force of legislative acts, Bluefield Water Works & Improvements Co. v. Public Service Comm., 362 U.S. 679 (1923).

Generally, although not universally, proceedings before administrative agencies which involve rate increases are instituted by the utilities involved. Contrary to the Court of Appeals' view this does not indicate agency disinterest in the level of rates, but rather a reasonable determination that as long as a utility is satisfied with the level of its rates, it is unlikely that the public interest requires that those rates be raised. The procedural device of permitting utilities to petition for changes in rates does not detract from the fundamental importance to the regulatory scheme of ratemaking by state and federal agencies without court interference. See, Federal Power Commission v. The Hope Natural Gas Co., 320 U. S. 591 (1944).

#### C. The Court of Appeals Failed to Recognize the Administrative Expertise Required to Establish Utility Rates.

The decision below errs by failing to consider the expertise of administrative agencies in ratemaking. The Court of Appeals found that agency expertise would not assist a district court in its fact finding task (App. p. 27a) even though the facts at issue involved the reasonableness of utility rates. The decision below suggests that the district court could (and perhaps must)

During periods of falling electric rates, such as much of the 1960's, proceedings to lower rates were routinely instituted by the regulatory agencies.

substitute its own views on ratemaking for those of the administrative agencies involved (App. pp. 20a, 21a, 27a). This is contrary to the basic principles of administrative law and to clear legislative mandate, Federal Power Commission v. The Hope Natural Gas Co., supra.

In establishing rates, an administrative agency will act largely on the basis of a determination of the cost a utility incurs in providing service, but it must also consider a variety of other economic, social and public policy issues. See generally Bonbright, Principles of Public Utility Rates (1960), Ch. 4 to 8. (In the case of FERC, one issue which must be considered is the question of any anti-competitive effect of the rates, Federal Power Commission v. Conway Corp., supra.) Even when consideration is limited to costs alone, however, different rate levels will result from the application of different theories of pricing, different methods of cost allocation, and even different methods of accounting, Similarly, an agency's selection of the rate of return which it will authorize a utility to earn is a decision requiring the application of expert judgment. A well developed body of law recognizes the expertise of administrative agencies in such matters, and limits the scope of judicial review of such determinations. See Davis, Administrative Law Treatise, § 29.09.

#### D. Courts Should Not Re-examine Rates Established by Regulatory Agencies.

The needless conflict which the Court of Appeals created between regulatory statutes and the antitrust laws can be avoided by application of the doctrine of primary jurisdiction. A district court which is faced with an antitrust complaint against a utility should defer to the rulings of the appropriate administrative agencies on issues involving the level or structure of rates. This is not to suggest that all of the actions of electric utilities are immune to antitrust challenge. It is to suggest only that the rates which a utility charges cannot be challenged collaterally, at least to the extent they are actively regulated by a federal or state agency. The district courts would still have the ability to hear, and remedy, cases involving anticompetitive actions.

Conduct which a district court can clearly deal with because it is outside of, or peripheral to, the regulatory process includes conduct like that involved in Otter Tail and Cantor, supra. Similarly, utility abuse of the regulatory system could give rise to antitrust liability. Although the Conway case, supra, did not involve an action before a district court, the facts alleged in that case, if proven, would supply an example of such abuse. In Conway it was alleged that a utility had deliberately and voluntarily depressed its retail rates for the purpose of injuring a competitor, 426 U. S. at 229. Since regulatory commissions are understandably reluctant to grant larger rate increases than utilities themselves claim are necessary, the practical effect of seeking retail rates which are unduly low may be to avoid effective regulation by the state public service commission. The district courts should be free to remedy competitive injuries which arise from such conduct. (The form of remedy which would be appropriate will be one of the issues before this Court if a writ of certiorari is granted.) Other situations can also be imagined in which a utility could pervert the regulatory system to anticompetitive ends. In any such situation a district court would be free to act.

Absent such deliberate and voluntary anticompetitive actions, however, a district court should not interfere with the decisions of the federal and state agencies which regulate utility rates. In particular, district courts should not become forums for the relitigation of contested rate cases.

Respectfully submitted,

RICHARD G. FERGUSON,
HARLAN M. DELLSY,

1 First National Plaza,
Chicago, Illinois 60603,
(312) 786-7500,

Counsel for Amicus Curiae.

#### Of Counsel:

RICHARD E. POWELL, LAWRENCE D. LASKY, ISHAM, LINCOLN AND BEALE.

December 16, 1977.

MAY S 1878

#### IN THE

## Supreme Court of the United States october term, 1977

No. 77-689

Indiana & Michigan Electric Company,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA,
and
TOWN OF AVILLA, INDIANA,
municipal corporations,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF EDISON ELECTRIC INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

TAYLOR R. BRIGGS
140 Broadway
New York, New York 10005
(212) 269-1100
Counsel for Amicus Curiae

#### Of Counsel:

LeBoeuf, Lamb, Leiby & MacRae 140 Broadway New York, New York 10005

May 5, 1978

#### IN THE

## Supreme Court of the United States october term, 1977

No. 77-689

Indiana & Michigan Electric Company,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,

CITY OF NILES, MICHIGAN,

CITY OF COLUMBIA CITY, INDIANA,

CITY OF BLUFFTON, INDIANA,

CITY OF GARRETT, INDIANA,

CITY OF GAS CITY, INDIANA,

Town of Frankton, Indiana,

TOWN OF WARREN, INDIANA,

Town of New Carlisle, Indiana, and

Town of Avilla, Indiana, municipal corporations,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF EDISON ELECTRIC INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT

OF CERTIORARI

Pursuant to Rule 42(3) of the Rules of this Court, the Edison Electric Institute ("EEI") respectfully moves the Court for leave to file the brief amicus curiae annexed hereto. While Petitioner has granted its consent, Respondents have refused to do so.

<sup>1.</sup> Copies of the consent have been filed with the Clerk of the Court.

#### Interest of Amicus Curiae

EEI is the principal national association of electric utility companies. Its members serve 99.1% of all customers of the investor-owned segment of the utility industry and 77.1% of the nation's electricity users. Among EEI's interests are the development nationally of sound policies and procedures for the establishment of rates and tariffs by regulatory agencies.

At least ten of its members are presently parties in "price-squeeze" proceedings before the Federal Energy Regulatory Commission ("FERC"), and at least ten are defendants in private antitrust "price-squeeze" actions pending in at least ten different district courts.<sup>2</sup>

The decision below mandates that all such cases, all lengthy and complex, be tried simultaneously in both the FERC and a federal district court, each of which may apply different standards to their resolutions. The United States as amicus curiae encourages that result. Brief of the United States (hereinafter "Brief of the U.S."), filed May 2, 1978. The decision below also effectively requires each district court, in addition to the FERC, to determine the propriety of the level of wholesale rates charged by an EEI member to its municipal customers, and, in addition to the state regulatory agencies, to determine the propriety of the level of retail rates charged by an EEI member to its commercial and industrial customers. Piecemeal district court consideration of these national ratemaking issues flies in the face of Congress' recently articulated goal of a "comprehensive, centralized focus" for a national coordinated energy policy (Department of Energy Organization Act, Pub. L. No.

95-91, 91 Stat. 567, codified at 42 U.S.C. §§ 7101-7352 (1977)), a policy with which EEI and its members are cooperating.

A cumbersome and counterproductive scheme is mandated by the decision below; each member of EEI, which processes a wholesale rate filing, implements the resulting rates at its peril, until the successful conclusion of any potential private antitrust action, notwithstanding a finding by the FERC in that regulatory proceeding that the utility's rates were not only cost justified but were also not anticompetitive in either effect or intent. The dilemma faced by member utilities is highlighted by the positions set forth in the Brief of the U.S. Both the FERC and the Covernment oppose the petition sought herein and rather would require each utility to defend itself in private litigation until some undefined point at trial at which certain issues would be referred to the FERC.3 The prejudice which results from the decision below to EEI's members and to their ratepayers causes us to support the petition for a writ of certiorari.

EEI as a national association holds a position from which it can meaningfully present the national importance of the issues herein to the scheme of federal and state regulation of utility rate tariffs. Taking a broader view than is naturally available to the individual parties herein, the annexed brief amicus curiae, in addition to endorsing the arguments of petitioner, demonstrates the public interest

<sup>2.</sup> In addition to the proceedings listed in the Petition for Certiorari, pp. 11-12, it appears that "price-squeeze" allegations are now before the FERC in almost every current rate filing, and district court actions continue to be filed, e.g., City of Anaheim, Cailfornia v. Southern California Edison Co., Docket No. 78-0810 (C.D. Cal.).

<sup>3.</sup> At this point, there is a dichotomy between the positions of the FERC and the Government, which warrants present resolution by this Court. The FERC contends that eventually (at some undefined point in the litigation) every private action should be referred to it and that its determination of the merits would be binding upon the district court; the Government disagrees. EEI, for the reasons set forth in its brief amicus curiae annexed hereto, concurs with the FERC's argument that its determinations should be binding on the district court, but contends that the procedural framework suggested by the FERC would result in undue delay in the FERC's eventual determination of the issues and in a needless expenditure of resources by the judicial system and the litigating parties.

4

and Congressional intent in having a comprehensive, centralized focus for the determination of federal rate issues as part of the newly articulated coordinated national energy policy.

#### Conclusion

For the reasons stated above and in the annexed brief, EEI requests leave to file the annexed brief amicus curiae in support of the petition for a writ of certiorari.

Respectfully submitted,

Taylor R. Briggs 140 Broadway New York, New York 10005 (212) 269-1100 Counsel for Amicus Curiae

Of Counsel:

LeBoeuf, Lamb, Leiby & MacRae 140 Broadway New York, New York 10005

May 5, 1978

#### TABLE OF CONTENTS

Brief for Amicus Curiae	PAG
Interest of Amicus Curiae	
Discussion	
I. The Procedure Mandated By the Court of Appeals Is Cumbersome, Inefficient and Against the Public Interest	
II. Petitioner's Argument Is Supported by Recent Legislative and Administrative Action	
Conclusion	1
TABLE OF AUTHORITIES	
Cases:	
Boston Edison Company, Docket Nos. E-7738 and E-7784, F.P.C. Opinion No. 809 (July 6, 1977), Opinion No. 809-A (December 9, 1977)	5, 6,
Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976)	3,
Statutes:	
Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 567 (codified at 42 U.S.C. §§ 7101-7352 (1977)):	
Section 101, 42 U.S.C. § 7111	
Section 102, 42 U.S.C. § 7112	8,
Section 103, 42 U.S.C. § 7113	

#### ii

#### Miscellaneous:

	PAGE
Boston Edison Company, Docket No. E-7738, Petition for Leave to Intervene of Department of Justice (February 17, 1978), Paragraph IV	
Department of Justice Press Release (February 15, 1978)	7
F.P.C. Order 563, issued March 21, 1977, 42 Fed. Reg. 16131 (March 25, 1977), rehearing denied, F.P.C. Order 563-A, issued May 20, 1977, 42 Fed. Reg. 27574 (May 31, 1977)	5
41 Fed. Reg. 32910 (August 6, 1976)	5
H.R. 4018, 95th Cong. 1st Sess. (1977), 123 Cong. Rec. S. 16158	9
H.R. 8444, 95th Cong., 1st Sess. (1977), §§ 501 et. seq., 123 Cong. Rec. H. 8773	9
H.R. Conf. Rep. No. 95-539, 95th Cong. 1st Sess. 7a (1977)	8,9
S. Rep. No. 95-164, 95th Cong. 1st Sess. 7a (1977)	8

#### IN THE

### Supreme Court of the United States october term, 1977

No. 77-689

Indiana & Michigan Electric Company,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,

CITY OF NILES, MICHIGAN,

CITY OF COLUMBIA CITY, INDIANA,

CITY OF BLUFFTON, INDIANA,

CITY OF GARRETT, INDIANA,

CITY OF GAS CITY, INDIANA,

Town of Frankton, Indiana,

Town of Warren, Indiana,

Town of New Carlisle, Indiana, and

Town of Avilla, Indiana, municipal corporations,

Respondents.

## BRIEF AMICUS CURIAE OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Edison Electric Institute ("EEI") supports the petition of Indiana & Michigan Electric Company for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in City of Mishawaka v. Indiana & Michigan Electric Company, 560 F.2d 1314 (7th Cir. 1977).

#### INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set out in the motion for leave to file, which is bound together with the brief.

#### DISCUSSION

I.

# THE PROCEDURE MANDATED BY THE COURT OF APPEALS IS CUMBERSOME, INEFFICIENT AND AGAINST THE PUBLIC INTEREST

The procedure adopted by the Court of Appeals in effect requires that all "price-squeeze" actions be tried in both the Federal Energy Regulatory Commission ("FERC") and a federal district court. Every public utility that files with the FERC for increases in its wholesale rates will never be assured of the lawfulness of these rates until an antitrust suit is commenced and concluded in a federal district court. Securities prospectuses and annual reports of public utilities which have filed for wholesale rate increases in the recent past may have to carry caveats warning of potential antitrust liability. Wholesale rate levels and the revenues resulting therefrom, although having been found reasonable and therefore lawful by the FERC, can subsequently be attacked as unlawful. Increased capital costs, borne by the public as utility ratepayers, are certain to result-an accurate reflection of the increased risks that come from subsequent district court review of rates previously deemed just, reasonable, and not anticompetitive by the FERC.

The untenable position which public utilities will be placed in if the decision below is allowed to stand is high-lighted in the Brief Amicus Curiae of the United States ("Brief of the U.S."). The FERC recognizes that a determination of the reasonableness of a utility's rates must, at some point, be made by it. The FERC argues that its determination must be binding on a district court if the legal regulatory mechanism is to function efficiently. Court-

agency conflict seems inevitable given an approach that permits both the court and the agency to determine the competitive effects of rates set by the agency.

The Government is in sharp disagreement with the FERC on this point. It argues that the same rate determined by the FERC to be cost-justified and not anticompetitive might still be found, by a district court, to be anticompetitive (Brief of the U.S., pp. 22-23). But the Government's argument is clearly inconsistent with this Court's holding in Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976). This Court held that the FERC had jurisdiction, and must exercise this jurisdiction, to consider any anticompetitive effects of rates it has set. Surely this Court's direction to exercise jurisdiction indicates that the FERC's determination is more than a mere advisory opinion which can be modified or discarded by a federal district court. Yet this is precisely the effect of the argument advanced by the Government, albeit without the support of the FERC.1

Furthermore, EEI feels constrained to point out the inefficiency and inconsistency inherent in the position advocated by the Government. In its Brief, the Government argues that a federal district court ought to remand certain issues for determination by the FERC. But it is difficult to justify engagement of the FERC's regulatory apparatus in light of the Government's later statement that the district court should not be bound by the determination of the FERC. Even if one disregards for a moment the peril to EEI's members that comes from dual investigations into the lawfulness of a single set of rates, it seems a great waste of

<sup>1.</sup> Per contra, even the Government appears to recognize that action by a state regulatory body establishing retail rates would insulate mose rates from attack in a private antitrust suit. Brief of the U.S., p. 14, n. 5.

governmental resources to ask, indeed to require, an FERC determination of issues which will subsequently be redetermined by a district court.

In short, the scheme mandated by the court below, and supported by the Government, if not in whole by the FERC, sets up a costly and inefficient mechanism to determine "price-squeeze" issues. It greatly increases the risk of doing business for EEI's members, and plainly is a duplicative and therefore wasteful use of the courts and regulatory agencies.

#### II.

#### PETITIONER'S ARGUMENT IS SUPPORTED BY RECENT LEGISLATIVE AND ADMINISTRATIVE ACTION

Petitioner seeks certiorari on the grounds that the decision below directly conflicts with the principles of exclusive jurisdiction set forth in decisions of this Court and in the alternative that judicial economy requires that the FERC exercise primary judisdiction. EEI concurs with Petitioner's analysis of the applicable legal authorities and further suggests that recent legislative and administrative developments provide conclusive support for that position.

#### A. The Regulatory Gap Existing Prior to the Court's Decision in Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976) Has Been Closed.

In Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976), this Court held that the FERC had jurisdiction which it must exercise to close the previously existing gap where no single regulatory agency oversaw the relationship between federally-set wholesale rates and state-set retail rates. Since the Conway decision the FERC has moved expeditiously to exercise its new jurisdiction. Procedural

rules have been issued.<sup>2</sup> In a majority of the numerous rate cases before the FERC in which municipal or cooperative electric distribution systems have intervened, "price-squeeze" issues have been raised; many such cases have already been decided by the FERC. Presently pending before the agency are at least ten other rate cases which involve, at least in part, "price-squeeze" issues. Moreover, pursuant to its rulemaking order relating to the procedure governing consideration of "price-squeeze" issues, the FERC will have the benefit of consulting with the various state regulatory agencies in these determinations.<sup>3</sup>

As a result, it is now clear that the FERC not only has the jurisdiction to consider these issues but also has acquired the technical expertise and experience to exercise that jurisdiction so that, with respect to such issues, a cohesive and coordinated national policy may be formulated. The need for such a policy has recently been recognized by both the FERC and the Antitrust Division of the Department of Justice. On February 17, 1978, the Antitrust Division of the Department of Justice filed a Petition for Leave to Intervene in the matter of Boston Edison Company, Docket No. E-7738. That petition, and the recent opinion of the FERC,<sup>4</sup> pursuant to which the remanded "price-

<sup>2.</sup> F.P.C. Order 563, issued March 21, 1977, 42 Fed. Reg. 16131 (March 25, 1977), rehearing denied, F.P.C. Order 563-A, issued May 20, 1977, 42 Fed. Reg. 27574 (May 31, 1977).

<sup>3.</sup> Id. In the notice of the proposed rule, it was pointed out that: [T]his proceeding seems to be uniquely well suited to invocation of the cooperative Federal Power Commission state public service commission procedures authorized by Section 209(b) of the Federal Power Act. 41 Fed. Reg. at 32911.

The notice of the proposed "price-squeeze" rule additionally points out that "5 State Commissioners have agreed to serve as a board of consultants to advise this Commission. . " 41 Fed. Reg. at 32911.

<sup>4.</sup> Boston Edison Company, F.P.C. Opinion No. 809-A, Docket Nos. E-7738 and E-7784 (December 9, 1977).

squeeze" hearing will continue, point up the extensiveness of the obligation of the FERC to weigh and determine anti-trust issues which are alleged to have flowed from whole-sale electric rate filings.

In brief summary, the Commission,<sup>5</sup> in Opinion No. 809, Boston Edison Company, Docket No. E-7738 and E-7784, (July 6, 1977), had ruled that it was an error to find Boston Edison's wholesale rates discriminatorily high vis-a-vis its retail industrial rates, where no anti-competitive effect was found, and where the record on the "price-squeeze" issue required more evidence. In its December Opinion No. 809-A, the Commission denied a stay of the remand of the "price-squeeze" issues; instead it ordered full hearings in order to develop "the most complete remanded record on the issue of price squeeze . . ." Opinion No. 809-A, p. 14.6

By its intervention in the *Boston Edison* proceeding, the Department of Justice indicated its recognition that public interests beyond those of the particular parties in that proceeding would be considered:

That in view of the Commission's recently expressed desire for as complete a record as possible on the price squeeze issue the Department wishes to assist the Commission in developing that record and determining how best to apply antitrust law and policies to this issue. Boston Edison Company, Docket No. E-7738, Petition for Leave to Intervene of Department of Justice (February 17, 1978), Paragraph IV.

And the Department of Justice further noted, with respect to the remanded *Boston Edison* proceeding, that:

[T]his case will be the first Commission decision on the price-squeeze issue and will establish procedure and law for all future proceedings. (Emphasis added). Department of Justice Press Release, February 15, 1978.<sup>7</sup>

Moreover, recent action taken by Congress compels the conclusion that the cohesive and comprehensive treatment of the "price-squeeze" issue now being undertaken by the FERC with the assistance of the Antitrust Division is precisely that intended by Congress and that sporadic and conflicting district court antitrust actions would frustrate that goal.

<sup>5.</sup> Commission refers to either the FERC or its predecessor, the Federal Power Commission, according to the context.

<sup>6.</sup> Of course, the intervention of the Department of Justice may well be meaningless if these municipal corporations versus public utilities antitrust suits proceed sporadically through the federal courts and do not undergo a threshold determination by the FERC.

<sup>7.</sup> The FERC has advised the parties to that proceeding to address the following issues, a clear indication that the FERC will consider evidence relating to any alleged anticompetitive effects of the rates it sets:

<sup>1.</sup> Whether in attempting to prove anticompetitive effect actual competition or the potential for competition or both must be shown?

<sup>2.</sup> If only a showing of potential competition were necessary, how would it be defined and measured?

<sup>3.</sup> In determining the existence of anticompetitive effect, what significance is there, if any, that publicly owned utilities may be involved?

<sup>4.</sup> Are the retail rates of the wholesale customer alleging price squeeze of any significance in determining actual or potential competition?

<sup>5.</sup> Is the intent of the public utility alleged to have caused a price squeeze germane for purposes of fashioning a price squeeze remedy?

<sup>6.</sup> In determining a remedy for price squeeze, are the actions of the state utility commissions affecting retail rates relevant, and, if so, how are they relevant?

In fashioning a price squeeze remedy what constitutes the lower range of the 'zone of reasonableness'?
 Opinion No. 809-A, supra at pp. 14-15.

#### B. Congress Has Recently Articulated the Need for National Coordinated Energy Policy Making.

Recently, the Department of Energy Organization Act (Pub. L. No. 95-91, 91 Stat. 567, codified at 42 U.S.C. §§ 7101-7352 (1977)) (the "Act") became law. This legislation established a Department of Energy to assure a coordinated energy policy because:

The Congress of the United States finds that -

(4) responsibility for energy policy, regulation, . . . is fragmented in many departments and agencies and thus does not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and energy and conservation programs; . . . (Emphasis added). 42 U.S.C. § 7111.

In this legislation, Congress expressed its intent that the FERC would "carry out pricing and allocation decisions in the context of national energy policies, . . . with the development of national energy policy goals." S. Rep. No. 95-164, 95th Cong. 1st Sess. 7a (1977), p. 6.

The central goal of the Act is a nationally "coordinated energy policy" (42 U.S.C. § 7112(2)); the Act indicates specific legislative intent:

- (9) to promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost;
- (11) to provide for the cooperation of Federal, State, and local governments, in the development and implementation of national energy policies and programs;
- (12) to foster and assure competition among parties engaged in the supply of energy and fuel;8

(17) to foster insofar as possible the continued good health of the Nation's . . . municipal utilities . . . 42 U.S.C. § 7112.

Moreover, in pursuit of a nationally coordinated energy policy, the Act specifically provides for resolution of conflicts with any state through consultations with appropriate state officials (42 U.S.C. § 7113).

Finally, new legislation will also expand the powers of the recently established division of regulatory interventions housed within the Economic Regulatory Administration's Utility Systems office of the Department of Energy. H.R. 4018, 95th Cong. 1st Sess. 123 Cong. Rec. S. 16158 (1977); H.R. 8444, 95th Cong. 1st Sess. 123 Cong. Rec. H. 8773 (1977), §§ 501 et. seq. The office will play a crucial role as advisor of state regulatory reviews of utility rates. The central function of the new division will be to intervene in utility rate cases and related state proceedings wherever it appears that policies of the federal government need to be voiced. Clearly, the administrative apparatus is now present which will handle effectively any allegations of wholesale-retail "price-squeezes". And the continued use of the federal courts to impose periodic, piecemeal reviews of these administrative actions will surely serve to disrupt the development of a coordinated, national policy on utility rates.

competition in the supply of energy and fuels. This purpose is declarative of present law which requires agencies to give attention to antitrust principles in formulating regulatory policies and decisions. The substitute also includes the Senate language providing for the encouragement and fostering of municipal, state and cooperatively-owned utilities as well as private enterprise in the development and achievement of energy policies." H.R. Conf. Rep. No. 95-539, 95th Cong. 1st Sess. 7a (1977), pp. 55-56.

<sup>8. &</sup>quot;The conference substitute also adopts the Senate language which emphasizes that a purpose of the Act is to foster and assure

#### CONCLUSION

For all of the reasons stated above, EEI believes that this Court should grant the writ of certiorari requested by Indiana & Michigan Electric Company.

Respectfully submitted,

Taylor R. Briggs 140 Broadway New York, New York 10005 (212) 269-1100 Counsel for Amicus Curiae

Of Counsel:

LeBoeuf, Lamb, Leiby & MacRae 140 Broadway New York, New York 10005